DOCKET

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Title: Robert Francis, Warden, Petitioner
v.
Raymond Lee Franklin

Docketed:
March 27, 1984

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Boleyn, Susan V.

Counsel for respondent: Tabak, Ronald J.

Entry	Date	Note	Proceedings and Orders
1	Mar 27 1984	G	Petition for writ of certiorari filed.
2	Apr 5 1984		Appendix of petitioner Francis, Warden filed.
4	Apr 23 1984		Order extending time to file response to petition until May 12, 1984.
5	May 11 1984		Brief of respondent Raymond Lee Franklin in opposition filed.
6	May 11 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	May 15 1984		DISTRIBUTED. May 31, 1984
8	Jun 4 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Jun 4 1984		Petition GRANTED.
			**********
11	Jul 16 1984		Order extending time to file brief of petitioner on the merits until July 31, 1984.
12	Jul 31 1984		Joint appendix filed.
13	Jul 31 1984		Brief of petitioner Francis, Warden filed.
14	Aug 3 1984		Record filed.
15	Aug 31 1984		Brief of respondent Raymond Lee Franklin filed.
16	Oct 11 1984		CIRCULATED.
17	Oct 22 1984		SET FOR ARGUMENT. Wednesday, November 28, 1984. (1st case).
18	Nov 28 1984		ARGUED.

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PETITION FOR WRIT OF CERTIORARI

83-1590 (1)

Office - Supreme Court, U.S.
FILED
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CLERK

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT FRANCIS, WARDEN,
Petitioner,

v.

RAYMOND LEE FRANKLIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

1.

Whether the standards of this Court set forth in *Sandstrom v. Montana*, 442 U.S. 510 (1979), for determining when a charge on an essential element of an offense is burden-shifting has been intolerably broadened by the United States Court of Appeals for the Eleventh Circuit to a standard which requires that for a jury charge to pass constitutional muster, it must not contain any conflicting language as to the permissive nature of any presumption which is charged concerning an essential element of the offense?

2.

Whether this case presents a significant federal question with respect to the application of the harmless error rule set forth in this Court's decision in *Chapman v. California*, 386 U.S. 18 (1967) to contentions of impermissibly burden-shifting instructions?

3.

Whether the granting of a petition for certiorari in the case of *Koehler v. Engle*, 707 F.2d 241 (6th Cir. 1983), *cert. granted*, ____ U.S. ____, 104 S.Ct. 231 (1983), by this Court, a case raising similar questions to those posed in this case, requires the granting of this petition for a writ of certiorari?

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT FRANCIS, WARDEN,
Petitioner,

v.

RAYMOND LEE FRANKLIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Robert Francis, respectfully prays that the writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on November 16, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported in *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983). Set forth as Appendix A is a copy of the Order of the United States Court of

Appeals for the Eleventh Circuit entered on January 9, 1984 denying Petitioner's petition for rehearing. Set forth as Appendix B is a copy of the Order of the United States Court of Appeals for the Eleventh Circuit, dated January 30, 1984, denying Petitioner's suggestion for rehearing *en banc*. The opinion of the district court denying the espondent's application for federal habeas corpus relief is unreported.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 16, 1983. *See Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983). A timely petition for rehearing was denied on January 9, 1984. (*See* Appendix A). A timely petition for rehearing *en banc* was denied on January 30, 1984. (*See* Appendix B).

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person

> within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION

O.C.G.A. § 16-5-1:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show ar abandoned and malignant heart.

STATEMENT OF THE CASE

Respondent, Raymond Lee Franklin, was indicted in Cobb County, Georgia, during the January Term of 1979 for the kidnapping of Carol Heitmuller (Count I) and the murder of Claude Collie (Count II). A motion for change of venue filed by Respondent was granted and Respondent's trial was conducted in Bibb County, Georgia. Following a jury trial, Respondent was found guilty on both counts and received the death penalty for murder and a twenty year consecutive sentence for kidnapping. Respondent pursued his direct appeal to the Supreme Court of Georgia which affirmed his convictions and sentences in *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980). This Court denied Respondent's petition for a writ of certiorari on June 16, 1980. *See Franklin v. Georgia*, 447 U.S. 930 (1980).

A petition for a writ of habeas corpus was filed on March 27, 1981 in the Superior Court of Butts County, Georgia. Following a hearing, the state habeas corpus court denied Respondent state habeas corpus relief on September 10, 1981. Respondent's application for a certificate of probable cause to appeal to the Supreme Court

of Georgia was denied on November 1, 1981. A petition for a writ of certiorari was denied by this Court in *Franklin v. Zant*, 456 U.S. 938 (1982).

Respondent filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Macon Division on May 14, 1982. On December 9, 1982, the district court denied Respondent's application for federal habeas corpus relief and entered judgment on behalf of Petitioner. The district court granted Respondent's application for a certificate of probable cause to appeal on January 4, 1983.

Following briefing and oral argument in the United States Court of Appeals for the Eleventh Circuit, a panel of that Court entered a decision on November 16, 1983, directing that the district court's order denying the writ of habeas corpus be reversed and that the district court issue the writ, commanding the state to retry Respondent within a reasonable time or release him from any further restraint resulting from his conviction. *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983).

A suggestion for rehearing and rehearing *en banc* was filed on behalf of the Petitioner. The petition for rehearing was denied by order of the United States Court of Appeals for the Eleventh Circuit dated January 9, 1984. (Appendix A). Petitioner's suggestion for rehearing *en banc* was denied by order of the United States Court of Appeals for the Eleventh Circuit dated January 30, 1984. (Appendix B). The basis for the granting of the writ of habeas corpus was a finding by the panel that the trial court's charge on intent impermissibly shifted the burden of proof to the Respondent in violation of the principles set forth by this Court in its decision in *Sandstrom v.*

Montana, 442 U.S. 510 (1979). Petitioner seeks review of this holding of the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS MISINTERPRETED AND MISAPPLIED THE STANDARDS OF THIS COURT SET OUT IN *SANDSTROM V. MONTANA*, 442 U.S. 510 (1979) AND *CUPP V. NAUGHTEN*, 414 U.S. 141 (1973), SO AS TO RESULT IN A CONFLICT WITH THE LAWS OF THE STATE OF GEORGIA AND A CONFLICT WITHIN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AS TO THE INTERPRETATION OF THESE STANDARDS.

In *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983), a panel of the United States Court of Appeals for the Eleventh Circuit concluded that the trial court's charge on intent impermissibly shifted the burden of proof to the Respondent in violation of the principles set forth by this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979). The portion of the charge alleged to be burden-shifting reads as follows:

> A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. *The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and*

> *probable consequences of his acts but the presumption may be rebutted.* A person will not be presumed to act with criminal intention but the trier of facts, that is, the jury may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

The Supreme Court of Georgia in Respondent's direct appeal to that Court upheld the above-stated charge in light of this Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Cupp v. Naughten*, 414 U.S. 141 (1973). *See Franklin v. State*, 245 Ga. 141, 154, 263 S.E.2d 666 (1980). This charge had been previously held to be non-burden-shifting under *Sandstrom v. Montana, supra*, in the decision of the Supreme Court of Georgia in *Skrine v. State*, 244 Ga. 520, 260 S.E.2d 909 (1979). In *Skrine v. State, supra*, the Supreme Court of Georgia held that this charge created "a permissive presumption" of the type found to be allowable in this Court's decision in *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). *Skrine v. State, supra* at 521.

In *Franklin v. State, supra*, the Supreme Court of Georgia properly noted that the charge in this case, considered as a whole, was distinguishable from that presented to this Court in *Sandstrom v. Montana*, in that the charge properly explains that criminal intent is not presumed, that the presumptions were rebuttable and that there was no burden on the defendant to prove anything. *Franklin v. State, supra* at 154. However, the United States Court of Appeals for the Eleventh Circuit in *Franklin v. Francis, supra* refused to consider the trial court's charge as a whole, but rather determined that a portion of the charge constituted a "mandatory rebuttable presumption" under *Sandstrom v. Montana, supra*. Instead of re-

viewing the charge as a whole, the United States Court of Appeals for the Eleventh Circuit simply delineated what it found to be a burden-shifting instruction on intent. Then the court improperly concluded that the charge as a whole, admittedly containing permissive language from which the jury could determine that no burden of proof had shifted to the Respondent, did not "cure" the alleged mandatory rebuttable presumption contained in one phrase of the trial court's instructions to the jury. By finding that the differences in the charge in this case and the charge in *Sandstrom v. Montana* were not constitutionally significant, not only did the court improperly apply *Cupp v. Naughten, supra* as relevant to a *Sandstrom* charge, but rendered inoperable the reasonable juror standard set forth by this Court in *Sandstrom v. Montana, supra*.

In so doing, the decision of the United States Court of Appeals for the Eleventh Circuit not only conflicted with numerous Georgia decisions finding such a charge to be constitutionally permissible under *Sandstrom v. Montana, supra*, such as *Skrine v. State, supra*, but also conflicted with other decisions within the United States Court of Appeals for the Eleventh Circuit itself, including *Lamb v. Jernigan*, 683 F.2d 1332, 1337 (11th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1276 (1983); *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983); *Brooks v. Francis*, 716 F.2d 780 (11th Cir. 1983); *Davis v. Zant*, 721 F.2d 1478 (11th Cir. 1983); *Drake v. Francis*, No. 83-8047 (11th Cir. Feb. 29, 1984).

In all of the above listed cases, the Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit evaluated the constitutionality of the

challenged jury instruction in light of the entire charge. In *Franklin v. Francis, supra*, the court highlighted language which might have the effect of a mandatory presumption, and determining that because there was "conflicting language" and it was allegedly "impossible" for the court to tell which presumption applied, the charge was thus impermissibly burden-shifting. A review of all of the language found to be "curative" by the Supreme Court of Georgia and in other decisions of the United States Court of Appeals for the Eleventh Circuit, leads inexorably to the conclusion that no mandatory presumption was created as any mandatory effect was dispelled by the other instructions clearly informing the jury that the presumption was rebuttable and that the defendant would not be presumed to act with criminal intention.

Not only did the court in *Franklin v. Francis* fail to apply this Court's decision in *Cupp v. Naughten, supra*, so as to require a review of the challenged instruction in light of the trial court's charge as a whole, but also intolerably broadened the standards set forth by this Court in *Sandstrom v. Montana, supra* for judging when a charge is impermissibly burden-shifting. In *Sandstrom v. Montana, supra*, this Court held that the standard for judging an allegedly impermissibly burden-shifting charge is whether a reasonable juror, construing the charge as a whole, would view the charge as having shifted the burden of proof to the defendant. The United States Court of Appeals for the Eleventh Circuit in *Franklin v. Francis, supra*, noted "conflicting" language concerning the presumption on intent rather than viewing the charge as a whole, and then determined that because there was some mandatory language, that a reasonable juror would of necessity have to view the charge as burden-shifting.

In *Corn v. Zant, supra*, viewing a similar instruction, the court concluded that the charge was ". . . fair and balanced in both tone and content. Whatever untoward effect any part of the instruction may have had was entirely vitiated by the clear statement of the state's responsibility to prove intent beyond a reasonable doubt." *Id.* at 560. *See also Drake v. Francis, supra, Slip Op.* at p. 21.

Under the analysis utilized by the United States Court of Appeals for the Eleventh Circuit, a charge containing any mandatory language would be impermissibly burden-shifting under *Sandstrom v. Montana*, regardless of the content of the remainder of the instructions given to the jury, as under the Eleventh Circuit analysis in *Franklin v. Francis*, it would have to be assumed that the jury applied the mandatory presumption.

This Court should grant a writ of certiorari to review the issue of whether the United States Court of Appeals for the Eleventh Circuit has totally ignored this Court's decision in *Cupp v. Naughten, supra*, and intolerably broadened the standard of *Sandstrom v. Montana, supra*, so as to conflict not only with the state law applying *Sandstrom v. Montana, supra*, but with numerous other decisions within the United States Court of Appeals for the Eleventh Circuit.

II. THIS CASE PRESENTS A SIGNIFICANT FEDERAL QUESTION WITH RESPECT TO THE APPLICABILITY OF THE HARMLESS ERROR RULE OF *CHAPMAN V. CALIFORNIA*, 386 U.S. 18 (1967) TO CONTENTIONS THAT INSTRUCTIONS ARE IMPERMISSIBLY BURDEN-SHIFTING.

This Court should grant the writ of certiorari to de-

termine the appropriate harmless error test to be applied to alleged *Sandstrom* violations. Petitioner is aware that this Court is equally divided with respect to the appropriate test to be applied to such issues, as evidenced by this Court's decision in *Connecticut v. Johnson*, ___ U.S. ___, 103 S.Ct. 969 (1983). The Court in *Franklin v. Francis*, *supra* appeared to apply both tests as it found the following:

> Because intent was plainly at issue in this case and was not overwhelming proved by the evidence (thus constituting harmless error under *Lamb*), we cannot find this error to be harmless.

Therefore, it is unclear what standard of harmless error is to be applied, i.e., whether it is a matter of whether intent is an issue in the case or a matter of whether evidence as to guilt is overwhelming. This Court should grant a petition for a writ of certiorari to determine which test is appropriate as in this case, intent was an issue, but the evidence of Respondent's guilt was overwhelming. Therefore, if it is the harmless error rule in *Chapman v. California*, *supra*, that is to apply, the decision of the United States Court of Appeals for the Eleventh Circuit would have to be reversed for a review of the facts of the case under the appropriate standard.

III. THE GRANTING OF A PETITION FOR A WRIT OF CERTIORARI IN *KOEHLER V. ENGLE*, 707 F.2d 241 (6th Cir. 1983), *cert. granted*, ___ U.S. ___, 104 S.Ct. 231 (1983) INVOLVING SIMILAR QUESTIONS TO THOSE ISSUES POSED IN THIS CASE, REQUIRES THE GRANTING OF A PETITION FOR A WRIT OF CERTIORARI.

In *Koehler v. Engle*, 707 F.2d 241 (6th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 231 (1983), two of the

issues involved in this case were raised in a petition for a writ of certiorari which was granted by this Court. In *Koehler v. Engle*, *supra* the question of federal law with regard to the applicability of *Cupp v. Naughten*, *supra*, to jury instructions allegedly violative of *Sandstrom v. Montana*, *supra* was raised. Additionally, the petitioner in *Koehler v. Engle*, *supra*, raised the question of the applicability of the harmless error test of *Chapman v. California*, 386 U.S. 18 (1967) to allegations that jury instructions were constitutionally deficient. These issues are so similar to those posed in the present petition for a writ of certiorari that Petitioner contends that this petition for a writ of certiorari should be granted so as to provide a uniform review of these issues.

CONCLUSION

For all the above and foregoing reasons, Petitioner prays that this Court grant a petition for a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in *Franklin v. Francis, supra*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this petition for a writ of certiorari upon the Respondent by depositing a copy of the same in the United States mail with proper address and adequate postage to:

Mr. Ronald J. Tabak
Hughes, Hubbard & Reed
One Wall Street
New York, New York 10005

Mr. John Charles Boger
99 Hudson Street
New York, New York 10013

This 26th day of March, 1984.

/s/
SUSAN V. BOLEYN

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-8022

RAYMOND LEE FRANKLIN,
Petitioner-Appellant,

versus

ROBERT FRANCIS, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING

(Opinion November 16, 1983, 11th Cir., 1983, ___ F.2d ___).

(January 9, 1984)

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON, Senior Circuit Judge.

PER CURIAM:

The state's petition for rehearing is denied with the following observations:

The state cites *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir. 1982), *cert. denied* ___ U.S. ___, 103 S.Ct. 1276 (1983), for the proposition that the differences between

the impermissible presumption instruction in *Sandstrom v. Montana*, 492 U.S. 510, 99 S.Ct. 2450 (1979), and the instruction we found impermissible in the panel opinion were "constitutionally significant." We do not read *Lamb* as supporting this argument; in *Lamb* the challenged jury instruction on intent was not mandatory. The charge in *Lamb* simply stated, "[I]ntent . . . *may be inferred* . . . from the proven circumstances or by the acts and conduct of the defendant or *may be* presumed when it *would be* the natural and probable consequence of the particular acts." 683 F.2d at 1339 (emphasis added). We noted in *Lamb* that both parts of this instruction were permissive:

> [T]he first part of the instruction, which was not present in *Sandstrom*, is perfectly sound, constitutionally and otherwise. The import of the statement that intent "may be inferred . . . from proven circumstances or by the acts and conduct of the defendant" is simply that the jury may rely on circumstantial evidence in finding intent. In no way does the instruction suggest that the burden is on the defendant rather than the prosecution or that the circumstantial evidence need not convince the jury of the defendant's intent beyond a reasonable doubt. . . . As to the second part of the instruction, stating that intent "may be presumed when it would be the natural and necessary consequence of the particular acts," such charge was also permissive. Unlike the ambiguous direction—"the law presumes that . . ."—contained in the *Sandstrom* and *Mason* [*v. Balkcom*, 669 F.2d 222 (5th Cir. Unit B 1982), *cert. denied* ____ U.S. ____, 103 S.Ct. 1260 (1983)] instructions, the "*may be* presumed" language used here was unlikely to be interpreted by reasonable jurors as *requiring* them to drawn an inference of intent.

Id. at 1339-40 (emphasis in original). In contrast, at Franklin's trial, the judge instructed the jury that "the

acts of a person . . . *are presumed* to be the product of the person's will . . . a person . . . *is presumed* to intend the natural and probable consequences of his acts. As in *Sandstrom*, this instruction gives the jury no option whether to apply it, and is thus mandatory.

Sandstrom analysis involves classifying an instruction as permissive or mandatory, and rebuttable or irrebuttable. Permissive presumptions are generally acceptable as long as there is a rational connection between the inference and the underlying facts. *County Court of Ulster County v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224-5 (1979). The same is true of only a few mandatory presumptions: "To the extent that a presumption imposes *an extremely low burden of production—e.g., being satisfacfied by 'any' evidence*—it may be well that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." *Id.* at 157 n.16, 99 S.Ct. at 2225 n.16 (emphasis added), cited in *Lamb* 683 F.2d at 1338 n.9. The challenged instructions at Franklin's trial created mandatory rebuttable presumptions that placed the burden on Franklin to rebut them by more than "some" evidence, *see Sandstrom*, 442 U.S. at 517, 99 S.Ct. at 2456, and were therefore not constitutionally permissible.

The state next argues, citing *Lamb* and *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983), that if the instructions did shift the burden to Franklin to prove that he lacked intent to kill, other language in the instructions cured the defect. We note first that while the *Lamb* panel indicated that other instructions "reduced the likelihood that the jury might misinterpret the [intent] instruction," 683 F.2d at 1339, the panel did not discuss whether the other instructions would be sufficient to cure a defective in-

struction. Rather, the panel decided that the instruction was not mandatory and therefore not defective. *Id.* at 1339-40.

In *Corn*, the panel did decide that other instructions cured a defective intent instruction. However, in addition to the other instructions given in Franklin's case, that we discussed in the panel opinion, Corn's jury heard a charge "replete with cautious explanations that refute Corn's claim that an irrebuttable presumption weighed against him." 708 F.2d at 559. The court quoted some of these instruction, *id.*, "by way of example:"

> [T]he instructions were clear that the accused "may" show circumstances to negate intent, "[b]ut he is not required to do so", and that he "may" show that the killing was done without malice, "[b]ut he is not required to do so." . . . [Also,] the court stated "[i]f such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist." The instruction continued, "this presumption . . . does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt the defendant was the intentional slayer."

The trial judge even instructed the jury specifically that "the burden is on the State to prove such intention beyond a reasonable doubt [and] the burden is not on the Defendant to disprove intention." *Id.* at 569. These instructions were all in addition to the general burden allocation instructions present at Franklin's trial as well as at Corn's trial, and the instruction that *criminal* intent should not be presumed, also present at both trials. In finding no reversible error in the trial judge's instructions, the *Corn* court noted in particular the above-quoted extra

instruction near the end of the charge regarding the allocation of the burden to prove intent. *Id.* at 560.

In the panel opinion we discussed why the instructions that the presumption could be rebutted and that a person would not be presumed to act with criminal intention did not cure the offensive intent instruction. Franklin's jury did not hear a charge containing the extra instructions set out in *Corn*.

The only extra instruction at Franklin's trial even remotely comprehensible as affecting the burden allocation on intent was the following:

> [I]t is not encumbent [sic] upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. The accused is not required to produce evidence of mitigation, justification or excuse on his part to the crime of murder. Whether mitigation, justification or excuse is shown by the evidence on the part of the State, it is not required of the accused to prove an absence of malice if the evidence for the State shows facts which may excuse or justify the homicide.

However, in context these instructions all referred to the malice part of the charge. Franklin argued that he did not intend to kill Claude Collie. The damaging presumption, that a person is presumed to intend the natural and probable consequences of his acts, was not mitigated by the correct malice charge.

In summary, the events adduced at trial showed clearly that Franklin fired the shot that went through the door and killed Claude Collie. The evidence also showed that the shot coincided with Collie's slamming the door in Franklin's face. Franklin was said to have been quite nervous. Though he had the opportunity to injure others

he did not. The only substantial question put to the jury was Franklin's intent. The presumptions contained in the instructions on intent were thus extremely important to the outcome of the trial. This is not a situation where we can take lightly the dictates of *Sandstrom;* we will not find constitutionally defective instructions to be cured when we have no language from which a reasonable juror could have understood the presumption and applied it in a constitutional manner.

The Petition for Rehearing is

DENIED.

APPENDIX B

Raymond Lee FRANKLIN,
Petitioner-Appellant,

v.

Robert FRANCIS, Warden,
Respondent-Appellee.

No. 83-8022.

United States Court of Appeals,
Eleventh Circuit.

Jan. 30, 1984.

Appeal from the United States District Court for the Middle District of Georgia.

ON SUGGESTION FOR REHEARING
EN BANC

(Opinion November 16, 1983, 11th Cir., 1983, 720 F.2d 1206)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON, and CLARK, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is

DENIED.

SUPPLEMENTAL APPENDIX

Office - Supreme Court, U.S.
FILED
APR 5 1984
ALEXANDER L. STEVAS,
CLERK

(2)

NO. 83-1590

IN THE

Supreme Court of the United States

October Term, 1983

ROBERT FRANCIS, WARDEN,
Petitioner,

v.

RAYMOND LEE FRANKLIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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26 pp

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed at 11:15 A.M., December 9, 1982; Elaine W. Jones, Deputy Clerk, U.S. District Court, Middle District of Georgia.]

RAYMOND FRANKLIN, *Petitioner,* VS. WALTER D. ZANT, Warden, *Respondent.*	CIVIL ACTION NO. 82-177-3-MAC

JUDGMENT

Pursuant to the Opinion and Order of this court which was dated and filed December 9, 1982, and for the reasons stated therein, the petition for a writ of habeas corpus is denied.

This 9th day of December, 1982.

GIRARD W. HAWKINS, Clerk

By: /s/ ELAINE W. JONES
ELAINE W. JONES
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed at 11:00 A.M., December 9, 1982; Elaine W. Jones, Deputy Clerk, U.S. District Court, Middle District of Georgia.]

RAYMOND FRANKLIN,
Petitioner,
vs.
WALTER D. ZANT, Warden,
Respondent.

CIVIL ACTION
NO. 82-177-3-MAC

OWENS, District Judge:

Having been convicted and sentenced to death for the brutal January 17, 1979, murder of Mr. Claude Collie in Cobb County, Georgia, and having unsuccessfully exhausted his statutory rights of direct appeal and petition for habeas corpus under the laws of this State, *Franklin* v. *State*, 245 Ga. 141, 263 S.E.2d 666 (1980), *Franklin* v. *Zant*, Habeas Corpus File No. 5025 (Superior Court of Butts County, Ga., Sept. 10, 1981), petitioner Raymond Lee Franklin, pursuant to 28 U.S.C. § 2254, filed his petition for a writ of habeas corpus in this court on May 14, 1982, alleging that he is in state custody in violation of the Constitution of the United States. Each of petitioner's allegations will be set forth and considered individually below.

1. Whether the trial judge's charge during the guilt-innocence phase of petitioner's trial was unconstitutionally burden-shifting under the principles of *Sandstrom* v. *Montana*, 442 U.S. 510, 61 L.Ed. 2d 39 (1979)?

Petitioner contends that the following instructions given by the trial judge to the jury during the guilt-innocence phase of his trial unconstitutionally shifted the burden of proof on the issue of "intention" or "criminal negligence:"

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will . . . [a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. . . ." (T. 656).

In determining the effect of this instruction on the validity of petitioner's conviction, the court is guided by the well-established principle that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-147, 38 L.Ed.2d 368, 373 (1973). The overall charge given by the trial judge was as follows:

> "Now, Ladies and Gentlemen, the burden is upon the State to prove to a reasonable and moral certainty and beyond a reasonable doubt every material allegation in each count of this indictment and I charge you further, that there is no burden on the defendant to prove anything. The burden is on the State.
>
> "Now, I give you in charge, certain definitions as found in the Criminal Code of the State of Georgia.
>
> "A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but

the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." (T. 656).

In *Sandstrom* the Supreme Court held that the giving of an instruction to the effect that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" is fatal to the validity of a criminal conviction in that it has the effect of relieving the State of the burden of proof on the critical issue of "intent." 442 U.S. at 514, 61 L.Ed.2d at 44. The instruction in *Sandstrom* was constitutionally deficient in two respects: (1) it failed to advise the jury that "intent" was not to be presumed; and (2) it failed to advise the jury that the aforementioned presumption was not conclusive.

After reviewing the overall charge given by the trial judge in the instant case, it is this court's considered judgment that the charge did not violate the principles announced by the Supreme Court in *Sandstrom*. In the instant case the trial judge carefully instructed the jury that: (1) there was no burden on the defendant to prove anything; (2) that the presumption in question was rebuttable, not conclusive; and (3) that a person will not be presumed to act with criminal intention. (T. 656). The instructions given to the jury are thus easily distinguishable from those found to be constitutionally deficient in Sandstrom. Accordingly, petitioner's contention is without merit.[1]

II. Whether the trial judge's charge during the sentencing phase of petitioner's trial was violative of the Eighth and Fourteenth Amendments in that the judge: (1) failed to adequately define mitigating circumstances; (2) failed to give the jury a sufficient number of examples of mitigating circumstances; (3) failed to instruct the jury on how they should weigh mitigating circumstances and aggravating circumstances; and, (4) failed to instruct the jury on how mitigating circumstances were to be applied in the determination of sentence?

It is well settled that in order for capital sentencing instructions to satisfy the requirements of the Eighth and Fourteenth Amendments, the instructions must "clearly guide a jury in its understanding of mitigating circumstances and their purpose, and the option to recommend a life sentence although aggravating circumstances are found . . . ." *Goodwin* v. *Balkcom*, 684 F.2d 794, 801-802 (11th Cir. 1982). After having carefully considered the entirety of the trial judge's instructions to the jury during the sentencing phase of petitioner's trial, it is the opinion of this court that his instructions were well within the guidelines set forth in *Goodwin*. Accordingly, petitioner's contentions are without merit.

III. Whether petitioner was denied the effective assistance of counsel during his trial and sentencing?

After having thoroughly flyspecked the trial transcript,

---

[1] Petitioner contends also that the instructions given to the jury on "accident" and "implied malice" were violative of the principles of *Sandstrom* v. *Montana*, 442 U.S. 510, 61 L.Ed.2d 39 (1979). These contentions are likewise without merit.

petitioner's present counsel points to numerous actions taken on the part of trial counsel which he contends reveal that trial counsel rendered ineffective assistance to petitioner.

In *Adams* v. *Balkcom*, 688 F.2d 734, 738 (11th Cir. 1982), the court set forth the standard to be applied by a reviewing court upon consideration of a petitioner's claim of ineffective assistance. The court stated:

> "The sixth amendment guarantees a criminal defendant the right to effective, not errorless, counsel. Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982); Mylar v. Alabama, 671 F.2d 1299, 1300 (11th Cir. 1982). Under the standard for reviewing claims of ineffective assistance of counsel, this court does not judge counsel's representation solely by the benefit of hindsight. Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir. 1981); Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980). Rather, we must determine whether counsel was reasonably likely to render, and rendered reasonably effective assistance. Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974) (quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), adhered to in pertinent part on rehearing en banc, 289 F.2d 928 (5th Cir.), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). The application of this standard requires an inquiry into the actual performance of defense counsel and a determination whether representation was reasonably effective based on the totality of the circumstances in the entire record. Washington v. Watkins, 655 F.2d at 1355; Baldwin v. Blackburn, 653 F.2d 942, 946 (5th Cir. 1981)." *Id.*

After conducting a thorough review of the record and trial transcript, it is the court's considered judgment that based on the totality of circumstances in the entire record, trial counsel performed competently and rendered reasonably effective representation. Accordingly, petitioner's contention is without merit.

IV. Whether the trial judge erred in failing to strike prospective juror Charles Pritchett from the traverse jury?

Petitioner contends that the *voir dire* testimony of prospective juror Charles Pritchett established that Pritchett was prejudiced against petitioner. Accordingly, petitioner contends that the trial judge improperly denied his counsel's challenge for cause thereby unfairly requiring counsel to exercise a peremptory challenge.

In *United States* v. *Butera*, 677 F.2d 1376 (11th Cir. 1982) the court stated:

> "Although 'as a general rule it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges,' United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976), the decision whether to excuse for cause is committed to the discretion of the district court. See Irvin v. Dowd, 366 U.S. 717, 723-24, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961); United States v. Salinas, 654 F.2d 319, 328 (5th Cir. 1981)." *Id.* at 1384.

In the instant case the trial judge asked venireman Pritchett if he could disregard his prejudice toward petitioner (due to the fact that petitioner had escaped from jail) if he were instructed to do so. (T. 159). Pritchett replied that he could do so for the purpose of this case. (T. 159). Accordingly, this court cannot find that the trial judge abused his discretion in failing to excuse Pritchett for cause. Petitioner's contention is therefore without merit.

V. Whether petitioner received timely and sufficient notice of prior convictions to be introduced by the State in the sentencing phase and whether the trial judge erred in excluding the testimony of three expert witnesses during the sentencing phase?

Petitioner contends that his rights under the Eighth and Fourteenth Amendments were violated in that he did not receive timely and sufficient notice of prior convictions to be introduced by the State in the sentencing phase of his trial.

On direct appeal the Supreme Court of Georgia addressed petitioner's contention and concluded that he had received timely and sufficient notice under the provisions of Ga. Code Ann. § 27-2503(a). *Franklin* v. *State*, *supra*, 245 Ga. at 149-50, 263 S.E.2d at 671-72. This court fully concurs. Petitioner's contention is therefore without merit.

Petitioner also contends that the trial judge erred in refusing to allow three expert witnesses to testify during the sentencing phase of his trial.

In *Lockett* v. *Ohio*, 438 U.S. 586, 604, 57 L.Ed.2d 973 990 (1978), the Supreme Court held that "the sentencer, in all but the rarest kind of capital case, [must] not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* The court further stated that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 604, n.12, 57 L.Ed.2d at 990, n.12.

In the instant case the excluded testimony did not relate to petitioner's character, prior record, or the circumstances of the offense. The trial judge was therefore acting within his authority to exclude the testimony. Accordingly, petitioner's contention is without merit.

VI. Whether the trial judge erred in admitting petitioner's confession?

Petitioner contends that his confession was not freely and voluntarily given and was therefore secured in violation of his rights under the Fifth, Sixth and Fourteenth Amendments.

In *Lego* v. *Twomey*, 404 U.S. 477, 484, 30 L.Ed.2d 624 (1974), the Supreme Court stated that "a judge [should] admit into evidence only those confessions that he reliably [finds], at least by a preponderance of the evidence, [to have] been made voluntarily." *Id.* After having carefully reviewed the transcript of the *Jackson* v. *Denno* hearing, the court concludes that the evidence was more than sufficient to have allowed the trial judge to find that the confession was freely and voluntarily given. Accordingly, petitioner's contention is without merit.

VII. Whether the trial judge erred in admitting testimony concerning evidence that petitioner was in "lawful custody?"

At the sentencing phase of petitioner's trial, the State relied upon Ga. Code Ann. § 27-2534.1(9) as an aggravating circumstance to be considered by the jury in determining whether petitioner should be sentenced to death. This code section allows the imposition of the death penalty upon a finding that "the offense of murder was committed by a person in, or who had escaped from, the lawful custody of a police officer or place of confinement."

Petitioner sought to prevent the State from proving that he was in "lawful custody" by stipulating to this fact. Petitioner thus contends that the trial judge erred in admitting testimony concerning evidence that he was in "lawful custody" because "lawful custody" had been stipulated and the testimony was inflammatory and prejudicial.

It is well settled that "as a general rule, a party may not preclude his adversary's proof by an admission or offer to stipulate." *United States* v. *Grassi*, 602 F.2d 1192, 1196 (5th Cir. 1979), *vacated and remanded on the other grounds*, 448 U.S. 902, 65 L.Ed.2d 1131 (1980). *See also*, *Parr* v. *United States*, 255 F.2d 86, 88 (5th Cir.), *cert. denied*, 358 U.S. 824, 3 L.Ed.2d 64 (1958). The reason for this is that "[a] cold stipulation can deprive a party 'of the legitimate moral force of his evidence,' (citation omitted), and can never fully substitute for tangible, physical evidence or the testimony of witnesses." *United States* v. *Grassi*, *supra*, 602 F.2d at 1197. Consequently, in most cases, a party is entitled "to present to the jury a picture of the events relied upon." *Parr* v. *United States*, *supra*, 255 F.2d at 88.

With this in mind, it is the court's considered judgment that the trial judge did not err in admitting testimony concerning evidence that petitioner was in "lawful custody." [2] Accordingly, petitioner's contention is without merit.

VIII. Whether the trial judge erred in allowing repetitive photographs of the victim into evidence?

Petitioner contends that the trial judge erred in allowing repetitive photographs of the victim into evidence. It is the opinion of this court that his contention is patently without merit. *See*, *United States* v. *Bowers*, 660 F.2d 527 (5th Cir. 1981); *United States* v. *Kaiser*, 545 F.2d 467 (5th Cir. 1977); *Campbell* v. *Superintendent*, 386 F.Supp. 778 (W.D. Va. 1974), *aff'd mem.*, 539 F.2d 705 (4th Cir. 1976), *cert. denied*, 429 U.S. 1064, 50 L.Ed.2d 781 (1977).

[2] The court feels further compelled to note that the trial judge gave explicit limiting instructions, explaining to the jury that the evidence was to be considered only on the question of lawful custody.

IX. Whether the exclusion of jurors with conscientious objections to capital punishment resulted in a jury that was partial to the State and non-representative of a fair cross-section of the community?

Petitioner contends that the exclusion of jurors with conscientious objections to capital punishment resulted in his being denied the right to a fair and impartial jury. This contention is patently without merit. *See*, *Smith* v. *Balkcom*, 660 F.2d 573 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir. 1982).

X. Whether blacks, women and young people were systematically excluded from the trial jury so as to violate petitioner's Sixth and Fourteenth Amendment rights?

Petitioner contends that blacks, women and young people were systematically excluded from the trial jury so as to violate his Sixth and Fourteenth Amendment rights.

In his State habeas proceeding, the court held that pursuant to Ga. Code Ann. § 50-127(1) petitioner was deemed to have waived any objection he might have had to the composition of the trial jury because he did not raise the objection at or prior to trial and could not show "cause" for his failure to do so.

State prisoners who fail to make a timely challenge to the composition of a jury are not, absent a showing of cause and actual prejudice, entitled to collateral relief under 28 U.S.C. § 2254. *See, Wright* v. *Wainwright*, 537 F.2d 224 (5th Cir. 1976). It is the opinion of this court that petitioner has shown neither cause nor actual prejudice. Accordingly, his objection to the composition of the trial jury is deemed to have been waived.

XI. Whether the imposition and execution of his death sentence under Georgia law violate petitioner's rights under the Eighth and Fourteenth Amendments?

Petitioner contends that the imposition and execution of his death sentence violate his constitutional rights in that: (1) the death penalty is administered and applied arbitrarily, capriciously and whimsically in the State of Georgia; (2) the theoretical justifications for capital punishment are groundless; (3) the infliction of the death penalty has been repudiated by contemporary standards of decency and dignity; and (4) the means by which the death sentence is administered inflict wanton and unnecessary torture. Petitioner's contention is patently without merit. *See, Gregg* v. *Georgia*, 428 U.S. 153, 49 L.Ed.2d 859 (1976); *Smith* v. *Balkcom*, *supra*, 660 F.2d at 584-85.

XII. Whether the Georgia Supreme Court and the appellate procedures utilized by it afford petitioner an adequate review of his convictions and sentences so as not to deny him a fundamentally fair hearing?

Petitioner contends that the present procedures, statutory provisions and actual practices in Georgia governing the review of death sentences denied him a fundamentally fair hearing and a reliable determination of the issue of

life and death. It is the court's considered judgment that this contention is patently without merit. *See, Smith* v. *Balkcom, supra*, 660 F.2d at 585-86.

CONCLUSION

After having carefully considered each of petitioner's allegations, it is the opinion of this court that he has been constitutionally convicted of murder in the courts of this State and sentenced to die. His petition for a writ of habeas corpus alleging to the contrary is therefore DENIED.

SO ORDERED, this 9th day of December, 1982.

/s/ WILBUR D. OWENS, JR.
WILBUR D. OWENS, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8022

RAYMOND LEE FRANKLIN,
Petitioner,

versus

ROBERT FRANCIS, Warden,
Respondent.

Appeal from the United States District Court for the Middle District of Georgia

---

(November 16, 1983)

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

Raymond Lee Franklin was convicted in the Superior Court of Bibb County, Georgia, for the murder of Claude Collie and the kidnapping of Carol Heitmuller. He was sentenced to death for murder and to twenty years imprisonment for kidnapping. In this habeas corpus review, we determine that the Superior Court's instructions to the jury shifted the burden of proof on the issue of intent to Franklin and consequently rendered his conviction invalid.

I.

In brief, the facts leading up to Franklin's conviction are as follows. While Franklin was being held in the Cobb County, Georgia, jail for trial on two offenses unrelated

to this appeal, he and four other inmates were taken to a local dentist's office for treatment. While at the office, the inmates were handcuffed to a length of chain. Franklin was released from the handcuffs for an injection, and while he was free, he grabbed the gun of one of the two law enforcement officers guarding him. He released the other inmates, seized the dentist's car keys, and escaped, taking the dentist's receptionist, Carol Heitmuller, with him as "protection." When the car keys did not work, Franklin took Ms. Heitmuller into a nearby neighborhood in search of another car. He knocked on Claude Collie's door, and when Collie answered, pointed the gun at him and demanded the keys to his car. Collie slammed the door in Franklin's face, and the gun Franklin was carrying discharged. The bullet traveled through the door and killed Mr. Collie. Franklin then fired a shot up into the ceiling. Meanwhile, Ms. Heitmuller managed to run to a neighbor's house. When Mrs. Collie, who was in the back of the house, heard the shots, she came to the door. Franklin demanded car keys from her. After she, too, fled to a neighbor's house, Franklin ran away. He eluded capture the rest of the day, but was caught that night, shortly after attempting to enter an occupied car in a parking lot.

Franklin was tried and sentenced in the Superior Court of Bibb County.[1] He appealed his conviction and sentence to the Georgia Supreme Court, which affirmed the trial court. *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980). The United States Supreme Court denied certiorari. *Franklin v. Georgia*, 447 U.S. 930, 100 S.Ct. 3029 (1980). Franklin thereafter filed a petition for a writ of habeas corpus in the Superior Court of Butts County. The petition was denied in an unreported order, and the Georgia Supreme Court declined to grant a certificate of

probable cause to appeal. The United States Supreme Court denied certiorari. *Franklin v. Zant*, ____ U.S. ____, 102 S.Ct. 1995 (1982). Franklin then petitioned the district court for a writ of habeas corpus. The district court denied his petition, without an evidentiary hearing, and Franklin took this appeal.

Franklin's petition alleged that the state trial court committed constitutional error (1) by refusing to excuse a venireman for cause, (2) by delivering instructions to the jury, at the conclusion of the guilt phase of Franklin's trial, that shifted the burden of proof to the defendant on the issues of intent, malice, and accident, in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979), (3) by allowing the state to introduce evidence of non-statutory aggravating circumstances during the sentencing phase of his trial, and (4) by refusing to admit Franklin's mitigating evidence. The record of Franklin's trial discloses a *Sandstrom* violation in the intent instruction as a matter of law; therefore, the writ must issue. We need not address petitioner's other claims.

II.

The *Sandstrom* trial court charged the jury: "[t]he law presumes that a person intends the ordinary consequences of his voluntary act." *Id.* at 513, 99 S.Ct. at 2453. Franklin contends that the instruction on intent at his trial [2] was sufficiently similar to the instruction in *Sandstrom* to warrant reversal. The Supreme Court in *Sandstrom* analyzed the type of challenge Franklin presents in several steps.

The threshold inquiry, according to *Sandstrom*, is "to determine the nature of the presumption [the jury instruction] describes." *Id.* at 514, 99 S.Ct. at 2454. This

requires "careful attention to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Id.* The State argued in *Sandstrom* that the trial court's instruction on intent merely created either a permissive inference, or a presumption that shifted to the defendant only the burden of producing "some evidence," leaving the burden of persuasion beyond a reasonable doubt at all times on the State. The Court disagreed, finding that

> First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence—thus effectively shifting the burden of persuasion on the element of intent.

Id. at 517, 99 S.Ct. at 2456. The Court noted that even if some jurors may have interpreted the challenged instruction as permisive, since a reasonable juror could have interpreted the presumption as mandatory, the instruction must be analyzed for constitutional purposes as mandatory. The Court stated, "[W]e cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these [potentially more harmful] interpretations." *Id.* at 519, 99 S.Ct. 2457.

In the instant case, the judge instructed that

> [t]he acts of a person of sound mind and discretion

> are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

This is a mandatory rebuttable presumption, as described in *Sandstrom*, since a reasonable juror could conclude that on finding the basic facts (sound mind and discretion) he must find the ultimate fact (intent for the natural consequences of an act to occur) unless the defendant has proven the contrary by an undefined quantum of proof which may be more than "some" evidence. Thus, on the intent instruction, this case proceeds to the second stage of the *Sandstrom* analysis.

In this stage we must determine whether the alleged burden shift affected an essential element of the state law offense. This question requires recourse to the state statute defining the offense and the state courts' interpretation thereof. O.C. Ga. § 16-5-1 (1982) defines the crime of malice murder:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

In *Lamb v. Jernigan*, 683 F.2d 1332, 1337 (11th Cir. 1982), *cert. denied* ___ U.S. ___, 103 S.Ct. 1276 (1983), we examined the Georgia decisions and concluded that intent to kill and the lack of provocation or justification are both essential elements of malice murder under the Georgia statute. Thus, the intent instruction in this case clearly relates to an essential element of the offense charged.

The Supreme Court's final step in *Sandstrom* was to determine whether either of the two possible interpretations of the intent presumption (that it was a conclusive presumption or a mandatory rebuttable presumption requiring the defendant to present evidence to the contrary) was constitutional. As the instruction in this case does not establish a conclusive presumption, we look to the *Sandstrom* analysis of a mandatory rebuttable presumption.

The Supreme Court rejected as unconstitutional a mandatory rebuttable presumption that did not make it plain to the jury that the burden of persuasion as to intent was on the State. The Court reached this conclusion because the jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove he lacked the requisite mental state." 442 U.S. at 524, 99 S.Ct. at 2459. The Court found this result to violate the constitutional principles of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975), in which a jury charge on malice murder allowed the jury to infer malice upon a showing of intentional unlawful homicide, unless the defendant proved by the preponderance of the evidence that he acted in the heat of passion or sudden provocation.[3]

The presumption on intent in this case allowed the same result as did the presumption in *Sandstrom*. A reasonable jury could have understood the instruction to mean that the burden to prove "no intent to kill" shifted to the defendant once the State showed sound mind, the act of pointing the gun at Mr. Collie, and pulling the trigger, of which the natural and probable consequence was Mr. Collie's death.

The problem with the charge on intent here is that the

jury was never enlightened as to the nature of the burden on Franklin to rebut the presumption that he intended the killing. If the jury was persuaded that Franklin had to produce more than some evidence that he did not intend to kill, the burden shifted impermissibly on an element essential for a malice murder verdict.

The trial court's additional charge to the jury, (1) that criminal intent is not presumed and (2) that the burden to show every element of the crime is on the State, did not cure the faulty intent instruction. This charge was present in *Sandstrom*, and the court commented:

> The potential for [the impermissible] interpretations of the presumption was not removed by the other instructions given at the trial. It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.

442 U.S. at 518 n.7, 99 S.Ct. at 2456 n.7. The same is true of the general burden allocation instructions here.

Neither did the instruction that criminal intent should not be presumed eliminate the vice *Sandstrom* condemns. This instruction at best conflicted with the challenged presumption; it did not explain it. At worst, the jury could have made the instructions consistent, interpreting the burden to be on the defendant to rebut the presumption that he intended to kill Mr. Collie, and on the State to show that the killing itself was criminal. Even if the jury

believed that the two presumptions conflicted, it would be impossible for us to tell which one they decided to apply, or whether they applied something in between. The only way the charge as a whole could have cured the instruction would have been to explain by what quantum of evidence the defendant must rebut the presumption. If no instruction is given expressly to explain or limit an instruction that otherwise impermissibly shifts the burden of persuasion under *Sandstrom*, we inevitably face a situation where the reasonable juror could conclude from either one impermissible shift or several conflicting presumptions, some of which are impermissible, that the burden has shifted.

III.

Our inquiry does not end with a finding that an instruction unconstitutionally shifts the burden of persuasion. Before reversing a conviction on the basis of a *Sandstrom* error, we must evaluate whether the error was harmless. *See, e.g., Lamb; Brooks v. Francis*, No. 83-8028, slip op. at 1, 16-17 (11th Cir. Sept. 15, 1983). Here, Franklin admitted that he fired the gun and killed Mr. Collie. His only defense was that he did not have the requisite intent to kill. The facts did not overwhelmingly preclude that defense. The coincidence of the first shot with the slamming of the door, the second shot's failure to hit anyone, or take a path on which it would have hit anyone, and the lack of injury to anyone else all supported the lack of intent defense. A presumption that Franklin intended to kill completely eliminated his defense of "no intent." Because intent was plainly at issue in this case, and was not overwhelmingly proved by the evidence (thus constituting harmless error under *Lamb*), we cannot find this error to be

harmless. Accordingly, the district court's order denying the writ of habeas corpus must be reversed. On receipt of the mandate, the district court shall issue the writ, commanding the State to try Franklin within such reasonable time as the district court shall determine or to release him from any further restraint resulting from this conviction.

REVERSED, with instructions.

---

[1] He was originally scheduled to be tried in Cobb County but obtained a change of venue to Bibb County.

[2] The charge to the jury in relevant part reads as follows; the challenged intent instruction is italicized.

> The defendant's plea of not guilty which has been entered on his behalf challenges and denies every material allegation in each count of this indictment and I charge you that before the State is entitled to a verdict of conviction of this defendant at your hands upon either count of this indictment, the burden is upon the State of proving the defendant's guilt as charged in such count beyond a reasonable doubt. The State, however, is not required to prove the guilt of the defendant beyond all doubt or to a mathematical certainty. Moral and reasonable certainty is all that can be expected in a legal investigation.
>
> * * *
>
> Now, the defendant enters upon his trial with the presumption of innocence in his favor and this presumption, while not evidence, is yet in the nature of evidence and it remains with him throughout the trial, unless and until it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt.
>
> * * *
>
> Now, Ladies and Gentlemen, the burden is upon the State to prove to a reasonable and moral certainty and beyond a reasonable doubt every material allegation in each count of this indictment and I charge you further, that there is no burden on the defendant to prove anything. The burden is on the State.
>
> Now, I give you in charge, certain definitions as found in the Criminal Code of the State of Georgia.
>
> A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it

> satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. *The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.* A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.
>
> * * *
>
> As to Count II, the State contends that Raymond Lee Franklin did on or about the 17th day of January, 1979, in Cobb County, with malice aforethought, kill Claude Collie, a human being, by shooting the said Claude Collie with a certain pistol, contrary to law, thereby committing the offense of murder.
>
> As to Count II, I charge you that the law of Georgia defines murder as follows: A person commits murder when he unlawfully and with malice aforethought either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.
>
> Now, you will see that malice is an essential ingredient in murder as charged in this indictment in Count II, and it must exist before the alleged homicide can be murder. Malice in its legal sense is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this unlawful, deliberate intention should exist for any particular length of time before the killing. If it enters the mind of the slayer the moment before he fires the fatal shot or strikes the fatal blow or inflicts the fatal wound, that is sufficient.
>
> Members of the jury, I charge you that it is not encumbent [sic] upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. The accused is not required to produce evidence of mitigation, justification or excuse on his part to the crime of murder. Whether mitigation, justification or excuse is shown by the evidence on the part of the State, it is not required of the accused to prove an absence of malice if the evidence for the State shows facts which may excuse or justify the homicide. But

it is for you, the members of the Jury, to say after a consideration of all the facts and circumstances in the case, whether or not malice, express or implied, exists in the case.

Now, members of the Jury, I charge you that if you believe beyond a reasonable doubt that Raymond Lee Franklin, in Cobb County, at any time prior to the return of this indictment, with a weapon or instrumentality named in the indictment, and with malice aforethought, either express or implied, did unlawfully and intentionally shoot and kill the deceased, Claude Collie, as charged in the indictment, and you believe the weapon or instrumentality used in the manner used, if one was used, was one likely to produce death, then you would be authorized and it would be your duty to convict the defendant of the offense of murder and in that event, the form of your verdict would be, "As to Count II, we, the Jury, find the defendant guilty."

Now, as to each count of this indictment, the defendant contends that he is not guilty of the offense charged and further contends that the State has not proved his guilt of the offenses as charged in each count to a reasonable and moral certainty and beyond a reasonable doubt, and he further contends as to Count II, the murder, that the homicide was an accident.

I charge you that a person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention of criminal negligence. An accident, in the eyes of the criminal law, is an event that takes place without one's foresight or expectation; that which takes place or begins to exist without design.

[3] The Supreme Court cited *United States v. Chiantese*, 560 F.2d 1244, 1255-56 (5th Cir. 1977), as support for its rejection of conclusive presumptions and mandatory rebuttable presumptions as quoted. In *Chiantese*, our predecessor, the former Fifth Circuit (*see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), where this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981), faced an instruction allowing a presumption of intent in the same way as did the instructions in *Sandstrom* and in the instant case. There, we used our supervisory power to require the district courts in this circuit, on pain or probable reversal, to eliminate the presumptive language. We cited with approval two jury instructions avoiding the problems, namely:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result

> from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent. . . . [from *United States v. Wilkinson*, 460 F.2d 725 (5th Cir. 1972), and]
>
> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and [any act] done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence. [from Federal Jury Practice & Instructions, § 14.13 (3d ed. 1977)].

OPPOSITION BRIEF

No. 83-1590

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT FRANCIS, WARDEN

Petitioner,

v.

RAYMOND LEE FRANKLIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPPOSITION TO THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI

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May 11, 1984

Counterstatement of Questions Presented

1. Whether this case, involving a mandatory burden-shifting presumption on the crucial disputed issue, presents a significant legal issue requiring further articulation of this Court's holding in Sandstrom v. Montana, 442 U.S. 510 (1979)?

2. Whether this case presents a significant federal question regarding harmless error, in view of the lack of overwhelming proof of intent, the key issue in the case?

3. Whether this Court's disposition of Engle v. Koehler, ___ U.S. ___, 52 U.S.L.W. 4383 (March 26, 1984), provides any basis for granting the writ of certiorari here, where the Eleventh Circuit's decision is fully in accord with prior holdings and clearly negates any possibility that the constitutional error was harmless?

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REASONS FOR DENYING
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I.

THE HOLDING BELOW IS COMPLETELY IN
ACCORD WITH SANDSTROM v. MONTANA,
442 U.S. 510 (1979), AND THUS DOES
NOT PRESENT A PROPER QUESTION FOR
REVIEW BY CERTIORARI

In Sandstrom v. Montana, 442 U.S. 510, 517 (1979), this Court held that a jury instruction setting forth a presumption that a person intends to accomplish the ordinary

consequences of his acts violates a defendant's Fourteenth Amendment rights:

> "if the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence -- thus effectively shifting the burden of prersuasion on the element of intent." (Id.)

In the instant case, respondent's jury was charged that:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." (Franklin v. Francis, 720 F.2d 1206, 1209 (11th Cir. 1983).)

The United States Court of Appeals for the Eleventh Circuit carefully analyzed the charge as a whole. In complete accordance with Sandstrom, supra, the Eleventh Circuit held the charge unconstitutional because it contained mandatory presumptions which a reasonable juror could have construed as requiring defense rebuttal by an undefined quantum of proof greater than "some" evidence. Franklin v. Francis, 720 F.2d 1206, 1210 (11th Cir. 1983), on petition for rehearing, 723 F.2d 770 (11th Cir. 1984).

Petitioner's assertion that the Eleventh Circuit failed properly to consider the trial court's charge as a whole is patently incorrect. Both of the Eleventh Circuit's

opinions specifically consider the trial court's other instructions to the jury. They hold that the "damaging presumption, that a person is presumed to intend the natural and probable consequences of his acts, was not mitigated by the correct malice charge" -- the "only extra instruction at Franklin's trial even remotely comprehensible as affecting the burden allocation on intent" -- because the crucial issue here was intent to kill, not malice. Franklin v. Francis, 723 F.2d 770, 772 (11th Cir. 1984), reaffirming analysis originally set forth in Franklin v. Francis, 720 F.2d 1206, 1211-12 (11th Cir. 1983).

Petitioner also clearly errs in asserting that the Eleventh Circuit's holding in the instant case is inconsistent with other decisions of the Eleventh Circuit, including Lamb v. Jernigan, 683 F.2d 1332, 1337 (11th Cir. 1982), cert. denied, ___ U.S. ___, 102 S. Ct. 1276 (1983); Corn v. Zant, 708 F.2d 549 (11th Cir. 1983); Davis v. Zant, 721 F.2d 1478 (11th Cir. 1983), rehearing en banc granted, 728 F.2d 492 (11th Cir. 1984); and Drake v. Francis, 727 F.2d 990 (11th Cir. 1984). The Eleventh Circuit's opinions in the instant case specifically distinguish Lamb and Corn, neither of which concern a mandatory, uncontradicted presumption bearing directly on the crucial issue in the case. Franklin v. Francis, 720 F.2d 1206, 1210-12 (11th Cir. 1983), on petition

for rehearing, 723 F.2d 770, 771-72 (11th Cir. 1984).* Moreover, even if the panel opinion in Davis, supra, is upheld on en banc reconsideration, it is patently distinguishable. Davis concerns a "malice" instruction, not an intent instruction, and it specifically envisions rebuttal by the state's evidence. 721 F.2d at 1488. In Drake, supra, 727 F.2d at 999, the majority cites the Eleventh Circuit's first decision in Franklin in support of its holding. The Drake decision nowhere indicates any view that Franklin was incorrectly decided.

Accordingly, the instant case presents neither an unwarranted extension of the Sandstrom doctrine nor an inconsistency with other federal cases.

---

* Judge Hill was a member of the panels in both the instant case and Corn, supra, and joined in the opinions in both cases.

II.

THE UNCONSTITUTIONAL BURDEN-SHIFTING CHARGE WAS CLEARLY NOT HARMLESS AND THUS DOES NOT PRESENT A PROPER QUESTION FOR REVIEW BY CERTIORARI

The Eleventh Circuit held that the unconstitutionality of the burden-shifting instructions was not harmless:

> "Here, Franklin admitted that he fired the gun and killed Mr. Collie. His only defense was that he did not have the requisite intent to kill. The facts did not overwhelmingly preclude that defense. The coincidence of the first shot with the slamming of the door, the second shot's failure to hit anyone, or take a path on which it would have hit anyone, and the lack of injury to anyone else all supported the lack of intent defense. A presumption that Franklin intended to kill completely eliminated his defense of 'no intent.' Because intent was plainly at issue in this case, and was not overwhelmingly proved by the evidence (thus constituting harmless error under Lamb, we cannot find this error to be harmless * * *." (Franklin v. Francis, 720 F.2d 1206, 1212 (11th Cir. 1983), and on petition for rehearing, 723 F.2d 770, 772 (11th Cir. 1984): ("The presumptions contained in the instructions on intent were thus extremely important to the outcome of the trial.").)

Petitioner creatively contends that because the Eleventh Circuit held there was not harmless error under any possible standard, certiorari should be granted to clarify which harmless error standard should apply. (Petition, at 10). Since the result below would be affirmed regardless of the legal standard employed, there is utterly no reason to grant the writ of certiorari here.

III.

IN VIEW OF THE EVIDENT HARMFULNESS OF THE CLEAR CONSTITUTIONAL VIOLATION IN THE INSTANT CASE, THIS COURT'S DISPOSITION OF ENGLE v. KOEHLER PROVIDES NO BASIS FOR GRANTING THE WRIT OF CERTIORARI

As shown above, the Sandstrom doctrine was not improperly extended in this case and the constitutional error was not harmless under any possible standard. Accordingly, the issuance of a majority opinion in Engle v. Koehler, ___ U.S. ___, 52 U.S.L.W. 4383 (March 26, 1984), would not have affected the outcome of the instant case. There is simply no proper reason to grant the writ here.

CONCLUSION

For the reasons set forth above, the petition for the granting of a writ of certiorari should be denied.

Dated: May 11, 1984

Respectfully submitted,

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AFFIDAVIT OF MAILING

I, RONALD J. TABAK, counsel of record for Raymond Lee Franklin, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of May, 1984, within the time permitted for filing, I caused to be deposited in the United States mail, with first-class postage prepaid, one original and nine copies of the foregoing Opposition To The Granting Of The Petition For Writ Of Certiorari, addressed to the Clerk of the Supreme Court of the United States.

Ronald J. Tabak
Ronald J. Tabak

Subscribed and sworn to
before me, a Notary Public
at New York, New York
this 11th day of May, 1984.

Leslie B. Dwyer
Notary Public

LESLIE B. DWYER
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission expires March 30, 1985

CERTIFICATE OF SERVICE

I, RONALD J. TABAK, counsel of record for Raymond Lee Franklin, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served upon the Petitioner a true and correct copy of the foregoing Opposition To The Granting Of The Petition For Writ Of Certiorari, by causing a copy of the same to be deposited in the United States mail with proper address and with adequate postage prepaid to: Susan V. Boleyn, Esq., Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia, 30334.

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JOINT APPENDIX

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No. 83-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT FRANCIS, WARDEN,
Petitioner,

v.

RAYMOND LEE FRANKLIN,
Respondent.

JOINT APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION

O.C.G.A. § 16-5-1:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

RELEVANT DOCKET ENTRIES

Conviction and Sentence of Raymond Lee Franklin in the Superior Court of Bibb County, Georgia.....April 26, 1979

Decision of Georgia Supreme Court Affirming Conviction and Sentence.....Jan. 4, 1980

Denial of State Habeas Corpus Relief.....Sept. 10, 1981

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Judgement and Order of United States Court of Appeals for Eleventh Circuit Granting Federal Habeas Corpus Relief.....Nov. 16, 1983

Denial of Petitioner's petition for rehearing.....Jan. 9, 1984

Denial of Petitioner's petition for rehearing *En Banc*.....Jan. 30, 1984

Petition for Certiorari Filed.....March 26, 1984

Order Granting Petition for Certiorari.....June 4, 1984

STATE OF GEORGIA	BIBB SUPERIOR COURT (COBB COUNTY CASE)
VS.	CASE #2016-79
RAYMOND LEE FRANKLIN	CHARGE: KIDNAPPING & MURDER

CHARGE TO THE JURY BY HONORABLE WALKER JOHNSON, JR.

Members of the Jury, the Grand Jury of Cobb County has returned an indictment charging Raymond Lee Franklin with the offenses of kidnapping and murder, in separate counts. To this indictment the defendant stood mute and the Court has directed that a not guilty plea be entered. The plea, on the one hand, and the indictment, on the other hand, form the issue which you as Jurors have been impaneled to try. These counts are being tried together, but I charge you that you are to consider each count against this defendant separately and you are to determine the guilt or innocence of the defendant on each of these counts without being controlled in that determination by your findings as to the guilt or innocence of the defendant in the other count. In other words, you try each of these counts against the defendant just as you would try it, if the defendant were on trial on one count and you were to determine the guilt or innocence of the defendant in each of these counts without being controlled by your determination of guilt or innocence on the other count.

Now, I'm not going to read the indictment to you. Thə indictment will be out with you subject to your inspection and it has been read to you. You should look at the

indictment and read it for the specific charges brought against this defendant.

Now, the charge I am about to give you will apply unless otherwise specified to each count of this indictment separately and you will consider the same in connection with each count of the indictment.

The fact that the defendant has been indicted by the Grand Jury raises no presumption or inference whatsoever against him. You will not take the fact that an indictment has been preferred against the defendant as having any probative or evidentiary force or value whatsoever. The indictment is only the process which the law has adopted to bring a defendant to trial, containing as it does, the contentions of the State. All of these contentions in this case are denied by the defendant. The defendant's plea of not guilty which has been entered on his behalf challenges and denies every material allegation in each count of this indictment and I charge you that before the State is entitled to a verdict of conviction of this defendant at your hands upon either count of this indictment, the burden is upon the State of proving the defendant's guilt as charged in such count beyond a reasonable doubt. The State, however, is not required to prove the guilt of the defendant beyond all doubt or to a mathematical certainty. Moral and reasonable certainty is all that can be expected in a legal investigation.

Now, reasonable doubt is just what that terms implies. It's a doubt based on reason. It is not an arbitrary nor a capricious doubt but it is just such a doubt as a reasonable man or woman would have, would act upon, or would decline to act upon in a matter of importance or grave concern to himself or herself. In other words, a reasonable doubt is the doubt of a fair-minded, impartial

juror actively seeking for the truth and it may arise from a consideration of the evidence, from a conflict in the evidence or from a lack of evidence. If, upon a consideration of all the facts and circumstances of this case, your mind is wavering, unsettled, not satisfied, then that is the reasonable doubt under the law and if such a doubt rests upon your mind, it is your duty to give the defendant the benefit of that doubt and acquit him. If, on the other hand, no such doubt rests upon your mind, it would be equally your duty to return a verdict of guilty.

Now, the defendant enters upon his trial with the presumption of innocence in his favor and this presumption, while not evidence, is yet in the nature of evidence and it remains with him throughout the trial, unless and until it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt.

Now, you are the judges of the law in the case but you take the law as given you in charge by the Court and applying the law to the facts as you find the facts to be, you return a verdict that speaks the truth of the case. That is the object of all legal investigations; the discovery of the truth.

You are the sole and exclusive judges of the facts in the case. You pass upon the weight, the force and the credit to be given to the evidence in the case and you alone determine the credibility of the witnesses who have testified in the case. In passing upon the credibility of the witnesses, you are authorized to consider all the facts and circumstances in the case, the witnesses' manner on the stand, their means and opportunity for knowing the facts about which they testified, their interest or want of interest in the case, their intelligence or lack of intelli-

gence, the nature of the matters to which they testified, the probability or improbability of their testimony, their bias or prejudice, if any, and also, their personal credibility insofar as they may legitimately appear from the trial. You may also consider the witnesses' relation to the case or to the parties in the case. All of these things are proper matters for your consideration insofar as they legitimately appear from the trial. It is for you to finally determine what credit is to be given to any witness.

Now, I charge you as to two types of evidence; direct evidence is that which immediately points to the question at issue. Indirect, or circumstantial, evidence is that which only tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis claimed. To warrant a conviction on circumstantial evidence alone, the proved facts shall not only be consistent with the hypothesis of guilt but shall exclude every other reasonable hypothesis, save that of the guilt of the accused.

When the guilt of a defendant depends on circumstantial evidence alone, the rule is that each separate fact or issue linked in the chain of circumstances from which the deduction of guilt is sought to be drawn must be clearly proven beyond a reasonable doubt. A fact or circumstance not so clearly proven, shall not be considered by the Jury as part of the chain of circumstances but should be rejected by them. The circumstances so proven must be a part of a complete, unbroken chain and must not only be consistent with the defendant's guilt, but must exclude every other reasonable hypothesis, save that of the guilt of the accused.

If one or more of the circumstances relied on by the State are not so clearly proven and for that reason you reject one or more of the circumstances so relied upon,

then you would require whether the remaining circumstances you believe are so clearly proven are consistent with the defendant's guilt, and inconsistent with any other reasonable hypothesis, save that of his guilt.

I charge you, however, that whether dependent upon direct or circumstantial evidence, the true test in a criminal case is not whether the conclusions at which the evidence points may be false, but whether or not the evidence is sufficiently strong to satisfy your minds and consciences to a reasonable and moral certainty and beyond a reasonable doubt of the defendant's guilt. If the evidence is thus strong, it would be your duty to convict. If it is not thus strong, it would be equally your duty to acquit.

Now, members of the Jury, you have heard some testimony concerning a statement that may or may not have been made by this defendant. I charge you that all statements shall be scanned with care and confessions of guilt shall be received with great caution. A confession alone uncorroborated by any other evidence shall not justify a conviction.

Members of the Jury, I charge you that flight, if any, by one who has done an act alleged to be a crime, immediately after the act and similar acts, if proved, from which an inference of a consciousness of guilt may be drawn by the Jury, may be considered by the Jury, but flight is subject to explanation. The weight to be given to it, and whether or not the Jury will draw the inference of a consciousness of guilt from it is a question for the Jury. It is for the Jury to determine whether the flight of the defendant, if any such has been shown, was due to a sense of guilt or was prompted by other causes and if the alleged flight was prompted by causes other than

a consciousness of guilt, no inference hurtful to the defendant should be drawn from the alleged flight.

Now, members of the Jury, the Court does not mean or intend by anything heretofore said or hereafter said to express or intimate to you any opinion as to what has or has not been proved in this case or as to what your verdict should or should not be. If the Court has said or done anything or should say or do anything during the progress of this trial, including this charge, which would lead you to believe that the Court has expressed or intimated any opinion as to what has or has not been proved or as to what your verdict should or should not be, then you will disregard that entirely and completely disabuse your minds of that.

Now, Ladies and Gentlemen, the burden is upon the State to prove to a reasonable and moral certainty and beyond a reasonable doubt every material allegation in each count of this indictment and I charge you further, that there is no burden on the defendant to prove anything. The burden is on the State.

Now, I give you in charge, certain definitions as found in the Criminal Code of the State of Georgia.

A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend

the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Now, members of the Jury, in Count I of this indictment, the State charges that on or about the 17th day of January, 1979, Raymond Lee Franklin did unlawfully abduct and steal away Carol Heitmuller, a person, without lawful authority and held Carol Heitmuller against her will.

Georgia law defines the offense of kidnapping as follows: A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against her will.

I charge you that if you believe beyond a reasonable doubt that the defendant Raymond Lee Franklin, in Cobb County, at about the time laid in this indictment, did abduct and steal away Carol Heitmuller without lawful authority or warrant and did hold Carol Heitmuller against her will, then you would be authorized and it would be your duty to convict the defendant of the offense of kidnapping and in that event, the form of your verdict would be, "As to Count I, we, the Jury find the defendant guilty of kidnapping."

As to Count II, the State contends that Raymond Lee Franklin did on or about the 17th day of January, 1979, in Cobb County, with malice aforethought, kill Claude Collie, a human being, by shooting the said Claude Collie with a certain pistol, contrary to law, thereby committing the offense of murder.

As to Count II, I charge you that the law of Georgia defines murder as follows: A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

Now, you will see that malice is an essential ingredient in murder as charged in this indictment in Count II, and it must exist before the alleged homicide can be murder. Malice in its legal sense is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this unlawful, deliberate intention should exist for any particular length of time before the killing. If it enters the mind of the slayer the moment before he fires the fatal shot or strikes the fatal blow or inflicts the fatal wound, that is sufficient.

Members of the Jury, I charge you that it is not encumbent upon the accused to prove an absence of malice, if the evidence for the prosecution shows facts which may excuse or justify the homicide. The accused is not required to produce evidence of mitigation, justification or excuse on his part to the crime of murder. Whether mitigation, justification or excuse is shown by the evidence on the part of the State, it is not required of the accused to prove an absence of malice, if the evidence for the State shows facts which may excuse or justify the homicide. But it is for you, the members of the Jury to say

after a consideration of all the facts and circumstances in the case, whether or not malice, express or implied, exists in the case.

Now, members of the Jury, I charge you that if you believe beyond a reasonable doubt that Raymond Lee Franklin, in Cobb County, at any time prior to the return of this indictment, with a weapon or instrumentality named in the indictment, and with malice aforethought, either express or implied, did unlawfully and intentionally shoot and kill the deceased, Claude Collie, as charged in the indictment, and you believe the weapon or instrumentality used in the manner used, if one was used, was one likely to produce death, then you would be authorized and it would be your duty to convict the defendant of the offense of murder and in that event, the form of your verdict would be, "As to Count II, we, the Jury, find the defendant guilty."

Now, as to each count of this indictment, the defendant contends that he is not guilty of the offense charged and further contends that the State has not proved his guilt of the offenses as charged in each count to a reasonable and moral certainty and beyond a reasonable doubt, and he further contends as to Count II, the murder, that the homicide was an accident.

I charge you that a person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention of criminal negligence. An accident, in the eyes of the criminal law, is an event that takes place without one's foresight or expectation; that which takes place or begins to exist without design.

Members of the Jury, if, from a consideration of the evidence or from a lack of evidence, you are not satisfied

beyond a reasonable doubt and to a reasonable and moral certainty that the State has established the guilt of the defendant of the offense charged in Count I or Count II, or both, of this indictment, then it would be your duty to acquit him as to such count and the form of that verdict would be, "As to Count I, we find the defendant not guilty." "As to Count II, we find the defendant not guilty."

Now members of the Jury, you decide this case on the facts of this case as you find them to be and as applied by you to the law in this case as given you in charge by the Court and you reach a verdict speaking the truth of the case. You are not concerned with the effect of your verdict, but you are concerned that it speaks the truth in the case. You will consider each count in the indictment separately and return a verdict under each count separately in one of the forms which the Court has given you in charge.

Members of the Jury, your verdict as to each count must be unanimous, in writing, dated and signed by your Foreman in this case. If you cannot unanimously agree on a verdict, the Court is required by law to declare a mistrial and try the case again before another Jury; however, no Juror is required to surrender his or her honest opinion because of an honest, different opinion of another Juror, or other Jurors, or for the purpose of reaching a unanimous verdict. Jurors should consult with one another and deliberate with a view of reaching a unanimous verdict, consistent with their consciences and oaths as Jurors. Each Juror must make an individual decision, but only after a fair and impartial consideration of the entire case with their fellow Jurors. A Juror should not hesitate to re-examine his or her views or change his or her opin-

ion, if after fair and impartial discussion and deliberations with the other Jurors, the Juror is honestly convinced that he or she should change his or her opinion. Every effort consistent with the instructions I have just given you and with your consciences and oaths as Jurors should be fairly and honestly made to reach a unanimous verdict in this case. Whatever your verdict is is a matter entirely for you, Ladies and Gentlemen, to determine.

Now, I'm going to ask the Bailiffs to take the Jury, minus the thirteenth Juror, up to the Jury room but I am instructing you not to begin deliberations until I send the evidence to you and advise you to begin your deliberations.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 8:45 P.M.)

BY THE COURT: Mr. Staples, do you have any exceptions to the Charge?

BY MR. STAPLES: No, sir, Your Honor, with the exception of the requests which you failed to charge.

BY THE COURT: Any exceptions for the State?

BY MR. CHARRON: No, Your Honor.

(WHEREUPON, JURY BEGAN THEIR DELIBERATIONS AT 9:03 P.M. AND RETURNED TO THE COURT ROOM AT 10:15 P.M. AND THE FOLLOWING TRANSPIRED:)

BY THE COURT: Who is your Foreman or Forelady?

BY FOREMAN GERECHT: I am, sir.

BY THE COURT: All right, the question is that you want a re-definition of malice and malice aforethought, is that right? (SEE T.821-(a) COURT'S EXHIBIT #A)

BY FOREMAN GERECHT: Yes, sir, and also we'd like a definition of what they legally term accidental.

ADDITIONAL CHARGE TO THE JURY BY THE COURT

I charge you on accident. The law of Georgia is that a person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. An accident is an event that takes place without one's foresight or expectations; that which takes place or begins to exist without design.

Malice aforethought is an essential ingredient of murder. Malice may either be express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Malice, as I said, is an essential ingredient in murder as charged in this indictment and it must exist before the homicide can be murder. Malice, in its legal sense, is not necessarily ill will or hatred. It is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this unlawful intention should exist for any particular length of time before the killing. If it enters the mind of the slayer the moment before he fires the fatal shot or strikes the fatal blow, or inflicts the fatal wound, that is sufficient.

Now, that's the definitions. Anything else?

BY FOREMAN GERECHT: That's all.

BY THE COURT: You may go back to the Jury room and resume your deliberations.

(WHEREUPON,THE JURY RETIRED TO THE JURY ROOM AT 10:20 P.M. FOR FURTHER DELIBERATIONS.)

BY THE COURT: Is there anything else?

BY MR. STAPLES: No, sir.

BY MR. CHARRON: No, Your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed at 11:15 A.M., December 9, 1982; Elaine W. Jones, Deputy Clerk, U.S. District Court, Middle District of Georgia.]

RAYMOND FRANKLIN,
Petitioner,
VS.
WALTER D. ZANT, Warden,
Respondent.

CIVIL ACTION
NO. 82-177-3-MAC

JUDGMENT

Pursuant to the Opinion and Order of this court which was dated and filed December 9, 1982, and for the reasons stated therein, the petition for a writ of habeas corpus is denied.

This 9th day of December, 1982.

GIRARD W. HAWKINS, Clerk

By: /s/ ELAINE W. JONES
ELAINE W. JONES
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed at 11:00 A.M., December 9, 1982; Elaine W. Jones, Deputy Clerk, U.S. District Court, Middle District of Georgia.]

RAYMOND FRANKLIN,
Petitioner,
vs.
WALTER D. ZANT, Warden,
Respondent.

CIVIL ACTION
NO. 82-177-3-MAC

OWENS, District Judge:

Having been convicted and sentenced to death for the brutal January 17, 1979, murder of Mr. Claude Collie in Cobb County, Georgia, and having unsuccessfully exhausted his statutory rights of direct appeal and petition for habeas corpus under the laws of this State, *Franklin* v. *State*, 245 Ga. 141, 263 S.E.2d 666 (1980), *Franklin* v. *Zant*, Habeas Corpus File No. 5025 (Superior Court of Butts County, Ga., Sept. 10, 1981), petitioner Raymond Lee Franklin, pursuant to 28 U.S.C. § 2254, filed his petition for a writ of habeas corpus in this court on May 14, 1982, alleging that he is in state custody in violation of the Constitution of the United States. Each of petitioner's allegations will be set forth and considered individually below.

I. Whether the trial judge's charge during the guilt-innocence phase of petitioner's trial was unconstitutionally burden-shifting under the principles of *Sandstrom* v. *Montana*, 442 U.S. 510, 61 L.Ed. 2d 39 (1979)?

Petitioner contends that the following instructions given by the trial judge to the jury during the guilt-innocence phase of his trial unconstitutionally shifted the burden of proof on the issue of "intention" or "criminal negligence:"

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will . . . [a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. . . ," (T. 656).

In determining the effect of this instruction on the validity of petitioner's conviction, the court is guided by the well-established principle that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-147, 38 L.Ed.2d 368, 373 (1973). The overall charge given by the trial judge was as follows:

> "Now, Ladies and Gentlemen, the burden is upon the State to prove to a reasonable and moral certainty and beyond a reasonable doubt every material allegation in each count of this indictment and I charge you further, that there is no burden on the defendant to prove anything. The burden is on the State.
>
> "Now, I give you in charge, certain definitions as found in the Criminal Code of the State of Georgia.
>
> "A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but

> the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." (T. 656).

In *Sandstrom* the Supreme Court held that the giving of an instruction to the effect that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" is fatal to the validity of a criminal conviction in that it has the effect of relieving the State of the burden of proof on the critical issue of "intent." 442 U.S. at 514, 61 L.Ed.2d at 44. The instruction in *Sandstrom* was constitutionally deficient in two respects: (1) it failed to advise the jury that "intent" was not to be presumed; and (2) it failed to advise the jury that the aforementioned presumption was not conclusive.

After reviewing the overall charge given by the trial judge in the instant case, it is this court's considered judgment that the charge did not violate the principles announced by the Supreme Court in *Sandstrom*. In the instant case the trial judge carefully instructed the jury that: (1) there was no burden on the defendant to prove anything; (2) that the presumption in question was rebuttable, not conclusive; and (3) that a person will not be presumed to act with criminal intention. (T. 656). The instructions given to the jury are thus easily distinguishable from those found to be constitutionally deficient in Sandstrom. Accordingly, petitioner's contention is with-

out merit.[1]

> II. Whether the trial judge's charge during the sentencing phase of petitioner's trial was violative of the Eighth and Fourteenth Amendments in that the judge: (1) failed to adequately define mitigating circumstances; (2) failed to give the jury a sufficient number of examples of mitigating circumstances; (3) failed to instruct the jury on how they should weigh mitigating circumstances and aggravating circumstances; and, (4) failed to instruct the jury on how mitigating circumstances were to be applied in the determination of sentence?

It is well settled that in order for capital sentencing instructions to satisfy the requirements of the Eighth and Fourteenth Amendments, the instructions must "clearly guide a jury in its understanding of mitigating circumstances and their purpose, and the option to recommend a life sentence although aggravating circumstances are found . . . ." *Goodwin* v. *Balkcom*, 684 F.2d 794, 801-802 (11th Cir. 1982). After having carefully considered the entirety of the trial judge's instructions to the jury during the sentencing phase of petitioner's trial, it is the opinion of this court that his instructions were well within the guidelines set forth in *Goodwin*. Accordingly, petitioner's contentions are without merit.

> III. Whether petitioner was denied the effective assistance of counsel during his trial and sentencing?

After having thoroughly flyspecked the trial transcript,

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[1] Petitioner contends also that the instructions given to the jury on "accident" and "implied malice" were violative of the principles of *Sandstrom* v *Montana*, 442 U.S. 510, 61 L.Ed.2d 39 (1979). These contentions are likewise without merit.

petitioner's present counsel points to numerous actions taken on the part of trial counsel which he contends reveal that trial counsel rendered ineffective assistance to petitioner.

In *Adams* v. *Balkcom*, 688 F.2d 734, 738 (11th Cir. 1982), the court set forth the standard to be applied by a reviewing court upon consideration of a petitioner's claim of ineffective assistance. The court stated:

> "The sixth amendment guarantees a criminal defendant the right to effective, not errorless, counsel. Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982); Mylar v. Alabama, 671 F.2d 1299, 1300 (11th Cir. 1982). Under the standard for reviewing claims of ineffective assistance of counsel, this court does not judge counsel's representation solely by the benefit of hindsight. Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir. 1981); Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980). Rather, we must determine whether counsel was reasonably likely to render, and rendered reasonably effective assistance. Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974) (quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), adhered to in pertinent part on rehearing en banc, 289 F.2d 928 (5th Cir.), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). The application of this standard requires an inquiry into the actual performance of defense counsel and a determination whether representation was reasonably effective based on the totality of the circumstances in the entire record. Washington v. Watkins, 655 F.2d at 1355; Baldwin v. Blackburn, 653 F.2d 942, 946 (5th Cir. 1981)." *Id.*

After conducting a thorough review of the record and trial transcript, it is the court's considered judgment that based on the totality of circumstances in the entire record, trial counsel performed competently and rendered reason-

ably effective representation. Accordingly, petitioner's contention is without merit.

IV. Whether the trial judge erred in failing to strike prospective juror Charles Pritchett from the traverse jury?

Petitioner contends that the *voir dire* testimony of prospective juror Charles Pritchett established that Pritchett was prejudiced against petitioner. Accordingly, petitioner contends that the trial judge improperly denied his counsel's challenge for cause thereby unfairly requiring counsel to exercise a peremptory challenge.

In *United States* v. *Butera*, 677 F.2d 1376 (11th Cir. 1982) the court stated:

> "Although 'as a general rule it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges,' United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976), the decision whether to excuse for cause is committed to the discretion of the district court. See Irvin v. Dowd, 366 U.S. 717, 723-24, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961); United States v. Salinas, 654 F.2d 319, 328 (5th Cir. 1981)." *Id.* at 1384.

In the instant case the trial judge asked venireman Pritchett if he could disregard his prejudice toward petitioner (due to the fact that petitioner had escaped from jail) if he were instructed to do so. (T. 159). Pritchett replied that he could do so for the purpose of this case. (T. 159). Accordingly, this court cannot find that the trial judge abused his discretion in failing to excuse Pritchett for cause. Petitioner's contention is therefore without merit.

V. Whether petitioner received timely and sufficient notice of prior convictions to be introduced by the State in the sentencing phase and whether the trial judge erred in excluding the testimony of three expert witnesses during the sentencing phase?

Petitioner contends that his rights under the Eighth and Fourteenth Amendments were violated in that he did not receive timely and sufficient notice of prior convictions to be introduced by the State in the sentencing phase of his trial.

On direct appeal the Supreme Court of Georgia addressed petitioner's contention and concluded that he had received timely and sufficient notice under the provisions of Ga. Code Ann. § 27-2503(a). *Franklin* v. *State*, *supra*, 245 Ga. at 149-50, 263 S.E.2d at 671-72. This court fully concurs. Petitioner's contention is therefore without merit.

Petitioner also contends that the trial judge erred in refusing to allow three expert witnesses to testify during the sentencing phase of his trial.

In *Lockett* v. *Ohio*, 438 U.S. 586, 604, 57 L.Ed.2d 973 990 (1978), the Supreme Court held that "the sentencer, in all but the rarest kind of capital case, [must] not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* The court further stated that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 604, n.12, 57 L.Ed.2d at 990, n.12.

In the instant case the excluded testimony did not relate to petitioner's character, prior record, or the circumstances of the offense. The trial judge was therefore acting within his authority to exclude the testimony. Accordingly, petitioner's contention is without merit.

VI. Whether the trial judge erred in admitting petitioner's confession?

Petitioner contends that his confession was not freely and voluntarily given and was therefore secured in violation of his rights under the Fifth, Sixth and Fourteenth Amendments.

In *Lego* v. *Twomey*, 404 U.S. 477, 484, 30 L.Ed.2d 624 (1974), the Supreme Court stated that "a judge [should] admit into evidence only those confessions that he reliably [finds], at least by a preponderance of the evidence, [to have] been made voluntarily." *Id.* After having carefully reviewed the transcript of the *Jackson* v. *Denno* hearing, the court condludes that the evidence was more than sufficient to have allowed the trial judge to find that the confession was freely and voluntarily given. Accordingly, petitioner's contention is without merit.

VII. Whether the trial judge erred in admitting testimony concerning evidence that petitioner was in "lawful custody?"

At the sentencing phase of petitioner's trial, the State relied upon Ga. Code Ann. § 27-2534.1(9) as an aggravating circumstance to be considered by the jury in determining whether petitioner should be sentenced to death. This code section allows the imposition of the death penalty upon a finding that "the offense of murder was committed by a person in, or who had escaped from, the lawful custody of a police officer or place of confinement."

Petitioner sought to prevent the State from proving that he was in "lawful custody" by stipulating to this fact. Petitioner thus contends that the trial judge erred in admitting testimony concerning evidence that he was in "lawful custody" because "lawful custody" had been stipulated and the testimony was inflammatory and prejudicial.

It is well settled that "as a general rule, a party may not preclude his adversary's proof by an admission or offer to stipulate." *United States* v. *Grassi*, 602 F.2d 1192, 1196 (5th Cir. 1979), *vacated and remanded on the other grounds*, 448 U.S. 902, 65 L.Ed.2d 1131 (1980). *See also*, *Parr* v. *United States*, 255 F.2d 86, 88 (5th Cir.), *cert. denied*, 358 U.S. 824, 3 L.Ed.2d 64 (1958). The reason for this is that "[a] cold stipulation can deprive a party 'of the legitimate moral force of his evidence,' (citation omitted), and can never fully substitute for tangible, physical evidence or the testimony of witnesses." *United States* v. *Grassi*, *supra*, 602 F.2d at 1197. Consequently, in most cases, a party is entitled "to present to the jury a picture of the events relied upon." *Parr* v. *United States*, *supra*, 255 F.2d at 88.

With this in mind, it is the court's considered judgment that the trial judge did not err in admitting testimony concerning evidence that petitioner was in "lawful custody." [3] Accordingly, petitioner's contention is without merit.

VIII. Whether the trial judge erred in allowing repetitive photographs of the victim into evidence?

Petitioner contends that the trial judge erred in allow-

[3] The court feels further compelled to note that the trial judge gave explicit limiting instructions, explaining to the jury that the evidence was to be considered only on the question of lawful custody.

ing repetitive photographs of the victim into evidence. It is the opinion of this court that his contention is patently without merit. *See, United States* v. *Bowers*, 660 F.2d 527 (5th Cir. 1981); *United States* v. *Kaiser*, 545 F.2d 467 (5th Cir. 1977); *Campbell* v. *Superintendent*, 386 F.Supp. 778 (W.D. Va. 1974), *aff'd mem.*, 539 F.2d 705 (4th Cir. 1976), *cert. denied*, 429 U.S. 1064, 50 L.Ed.2d 781 (1977).

IX. Whether the exclusion of jurors with conscientious objections to capital punishment resulted in a jury that was partial to the State and nonrepresentative of a fair cross-section of the community?

Petitioner contends that the exclusion of jurors with conscientious objections to capital punishment resulted in his being denied the right to a fair and impartial jury. This contention is patently without merit. *See, Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir. 1982).

X. Whether blacks, women and young people were systematically excluded from the trial jury so as to violate petitioner's Sixth and Fourteenth Amendment rights?

Petitioner contends that blacks, women and young people were systematically excluded from the trial jury so as to violate his Sixth and Fourteenth Amendment rights.

In his State habeas proceeding, the court held that pursuant to Ga. Code Ann. § 50-127(1) petitioner was deemed to have waived any objection he might have had to the composition of the trial jury because he did not raise the objection at or prior to trial and could not show "cause" for his failure to do so.

State prisoners who fail to make a timely challenge to the composition of a jury are not, absent a showing of cause and actual prejudice, entitled to collateral relief under 28 U.S.C. § 2254. *See, Wright* v. *Wainwright*, 537 F.2d 221 (5th Cir. 1976). It is the opinion of this court that petitioner has shown neither cause nor actual prejudice. Accordingly, his objection to the composition of the trial jury is deemed to have been waived.

XI. Whether the imposition and execution of his death sentence under Georgia law violate petitioner's rights under the Eighth and Fourteenth Amendments?

Petitioner contends that the imposition and execution of his death sentence violate his constitutional rights in that: (1) the death penalty is administered and applied arbitrarily, capriciously and whimsically in the State of Georgia; (2) the theoretical justifications for capital punishment are groundless; (3) the infliction of the death penalty has been repudiated by contemporary standards of decency and dignity; and (4) the means by which the death sentence is administered inflict wanton and unnecessary torture. Petitioner's contention is patently without merit. *See, Gregg* v. *Georgia*, 428 U.S. 153, 49 L.Ed.2d 859 (1976); *Smith* v. *Balkcom*, *supra*, 660 F.2d at 584-85

XII. Whether the Georgia Supreme Court and the appellate procedures utilized by it afford petitioner an adequate review of his convictions and sentences so as not to deny him a fundamentally fair hearing?

Petitioner contends that the present procedures, statutory provisions and actual practices in Georgia governing the review of death sentences denied him a fundamentally fair hearing and a reliable determination of the issue of

life and death. It is the court's considered judgment that this contention is patently without merit. *See, Smith* v. *Balkcom, supra,* 660 F.2d at 585-86.

CONCLUSION

After having carefully considered each of petitioner's allegations, it is the opinion of this court that he has been constitutionally convicted of murder in the courts of this State and sentenced to die. His petition for a writ of habeas corpus alleging to the contrary is therefore DENIED.

SO ORDERED, this 9th day of December, 1982.

/s/ WILBUR D. OWENS, JR.
WILBUR D. OWENS, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8022

RAYMOND LEE FRANKLIN,
Petitioner,

versus

ROBERT FRANCIS, Warden,
Respondent.

Appeal from the United States District Court
for the Middle District of Georgia

(November 16, 1983)

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

Raymond Lee Franklin was convicted in the Superior Court of Bibb County, Georgia, for the murder of Claude Collie and the kidnapping of Carol Heitmuller. He was sentenced to death for murder and to twenty years imprisonment for kidnapping. In this habeas corpus review, we determine that the Superior Court's instructions to the jury shifted the burden of proof on the issue of intent to Franklin and consequently rendered his conviction invalid.

I.

In brief, the facts leading up to Franklin's conviction are as follows. While Franklin was being held in the Cobb County, Georgia, jail for trial on two offenses unrelatep

to this appeal, he and four other inmates were taken to a local dentist's office for treatment. While at the office, the inmates were handcuffed to a length of chain. Franklin was released from the handcuffs for an injection, and while he was free, he grabbed the gun of one of the two law enforcement officers guarding him. He released the other inmates, seized the dentist's car keys, and escaped, taking the dentist's receptionist, Carol Heitmuller, with him as "protection." When the car keys did not work, Franklin took Ms. Heitmuller into a nearby neighborhood in search of another car. He knocked on Claude Collie's door, and when Collie answered, pointed the gun at him and demanded the keys to his car. Collie slammed the door in Franklin's face, and the gun Franklin was carrying discharged. The bullet traveled through the door and killed Mr. Collie. Franklin then fired a shot up into the ceiling. Meanwhile, Ms. Heitmuller managed to run to a neighbor's house. When Mrs. Collie, who was in the back of the house, heard the shots, she came to the door. Franklin demanded car keys from her. After she, too, fled to a neighbor's house, Franklin ran away. He eluded capture the rest of the day, but was caught that night, shortly after attempting to enter an occupied car in a parking lot.

Franklin was tried and sentenced in the Superior Court of Bibb County.[1] He appealed his conviction and sentence to the Georgia Supreme Court, which affirmed the trial court. *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980). The United States Supreme Court denied certiorari. *Franklin v. Georgia*, 447 U.S. 930, 100 S.Ct. 3029 (1980). Franklin thereafter filed a petiton for a writ of habeas corpus in the Superior Court of Butts County. The petition was denied in an unreported order, and the Georgia Supreme Court declined to grant a certificate of

probable cause to appeal. The United States Supreme Court denied certiorari. *Franklin v. Zant*, ___ U.S. ___, 102 S.Ct. 1995 (1982). Franklin then petitioned the district court for a writ of habeas corpus. The district court denied his petition, without an evidentiary hearing, and Franklin took this appeal.

Franklin's petition alleged that the state trial court committed constitutional error (1) by refusing to excuse a venireman for cause, (2) by delivering instructions to the jury, at the conclusion of the guilt phase of Franklin's trial, that shifted the burden of proof to the defendant on the issues of intent, malice, and accident, in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979), (3) by allowing the state to introduce evidence of nonstatutory aggravating circumstances during the sentencing phase of his trial, and (4) by refusing to admit Franklin's mitigating evidence. The record of Franklin's trial discloses a *Sandstrom* violation in the intent instruction as a matter of law; therefore, the writ must issue. We need not address petitioner's other claims.

II.

The *Sandstrom* trial court charged the jury: "[t]he law presumes that a person intends the ordinary consequences of his voluntary act." *Id.* at 513, 99 S.Ct. at 2453. Franklin contends that the instruction on intent at his trial [2] was sufficiently similar to the instruction in *Sandstrom* to warrant reversal. The Supreme Court in *Sandstrom* analyzed the type of challenge Franklin presents in several steps.

The threshold inquiry, according to *Sandstrom*, is "to determine the nature of the presumption [the jury instruction] describes." *Id.* at 514, 99 S.Ct. at 2454. This

requires "careful attention to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Id.* The State argued in *Sandstrom* that the trial court's instruction on intent merely created either a permissive inference, or a presumption that shifted to the defendant only the burden of producing "some evidence," leaving the burden of persuasion beyond a reasonable doubt at all times on the State. The Court disagreed, finding that

> First, a reasonably jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence—thus effectively shifting the burden of persuasion on the element of intent.

Id. at 517, 99 S.Ct. at 2456. The Court noted that even if some jurors may have interpreted the challenged instruction as permissive, since a reasonable juror could have interpreted the presumption as mandatory, the instruction must be analyzed for constitutional purposes as mandatory. The Court stated, "[W]e cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these [potentially more harmful] interpretations." *Id.* at 519, 99 S.Ct. 2457.

In the instant case, the judge instructed that

> [t]he acts of a person of sound mind and discretion

> are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

This is a mandatory rebuttable presumption, as described in *Sandstrom*, since a reasonable juror could conclude that on finding the basic facts (sound mind and discretion) he must find the ultimate fact (intent for the natural consequences of an act to occur) unless the defendant has proved the contrary by an undefined quantum of proof which may be more than "some" evidence. Thus, on the intent instruction, this case proceeds to the second state of the *Sandstrom* analysis.

In this stage we must determine whether the alleged burden shift affected an essential element of the state law offense. This question requires recourse to the state statute defining the offense and the state courts' interpretation thereof. O.C. Ga. § 16-5-1 (1982) defines the crime of malice murder:

> A person committs murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

In *Lamb v. Jernigan*, 683 F.2d 1332, 1337 (11th Cir. 1982), *cert. denied* ___ U.S. ___, 103 S.Ct. 1276 (1983), we examined the Georgia decisions and concluded that intent to kill and the lack of provocation or justification are both essential elements of malice murder under the Georgia statute. Thus, the intent instruction in this case clearly relates to an essential element of the offense charged.

The Supreme Court's final step in *Sandstrom* was to determine whether either of the two possible interpretations of the intent presumption (that it was a conclusive presumption or a mandatory rebuttable presumption requiring the defendant to present evidence to the contrary) was constitutional. As the instruction in this case does not establish a conclusive presumption, we look to the *Sandstrom* analysis of a mandatory rebuttable presumption.

The Supreme Court rejected as unconstitutional a mandatory rebuttable presumption that did not make it plain to the jury that the burden of persuasion as to intent was on the State. The Court reached this conclusion because the jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove he lacked the requisite mental state." 442 U.S. at 524, 99 S.Ct. at 2459. The Court found this result to violate the constitutional principles of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975), in which a jury charge on malice murder allowed the jury to infer malice upon a showing of intentional unlawful homicide, unless the defendant proved by the preponderance of the evidence that he acted in the heat of passion or sudden provocation.[2]

The presumption on intent in this case allowed the same result as did the presumption in *Sandstrom*. A reasonable jury could have understood the instruction to mean that the burden to prove "no intent to kill" shifted to the defendant once the State showed sound mind, the act of pointing the gun at Mr. Collie, and pulling the trigger, of which the natural and probable consequence was Mr. Collie's death.

The problem with the charge on intent here is that the

jury was never enlightened as to the nature of the burden on Franklin to rebut the presumption that he intended the killing. If the jury was persuaded that Franklin had to produce more than some evidence that he did not intend to kill, the burden shifted impermissibly on an element essential for a malice murder verdict.

The trial court's additional charge to the jury, (1) that criminal intent is not presumed and (2) that the burden to show every element of the crime is on the State, did not cure the faulty intent instruction. This charge was present in *Sandstrom*, and the court commended:

> The potential for [the impermissible] interpretations of the presumption was not removed by the other instructions given at the trial. It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.

442 U.S. at 518 n.7, 99 S.Ct. at 2456 n.7. The same is true of the general burden allocation instructions here.

Neither did the instruction that criminal intent should not be presumed eliminate the vice *Sandstrom* condemns. This instruction at best conflicted with the challenged presumption; it did not explain it. At worst, the jury could have made the instructions consistent, interpreting the burden to be on the defendant to rebut the presumption that he intended to kill Mr. Collie, and on the State to show that the killing itself was criminal. Even if the jury

believed that the two presumptions conflicted, it would be impossible for us to tell which one they decided to apply, or whether they applied something in between. The only way the charge as a whole could have cured the instruction would have been to explain by what quantum of evidence the defendant must rebut the presumption. If no instruction is given expressly to explain or limit an instruction that otherwise impermissibly shifts the burden of persuasion under *Sandstrom*, we inevitably face a situation where the reasonable juror could conclude from either one impermissible shift or several conflicting presumptions, some of which are impermissible, that the burden has shifted.

III.

Our inquiry does not end with a finding that an instruction unconstitutionally shifts the burden of persuasion. Before reversing a conviction on the basis of a *Sandstrom* error, we must evaluate whether the error was harmless. *See, e.g., Lamb; Brooks v. Francis*, No. 83-8028, slip op. at 1, 16-17 (11th Cir. Sept. 15, 1983). Here, Franklin admitted that he fired the gun and killed Mr. Collie. His only defense was that he did not have the requisite intent to kill. The facts did not overwhelmingly preclude that defense. The coincidence of the first shot with the slamming of the door, the second shot's failure to hit anyone, or take a path on which it would have hit anyone, and the lack of injury to anyone else all supported the lack of intent defense. A presumption that Franklin intended to kill completely eliminated his defense of "no intent." Because intent was plainly at issue in this case, and was not overwhelmingly proved by the evidence (thus constituting harmless error under *Lamb*), we cannot find this error to

be harmless. Accordingly, the district court's order denying the writ of habeas corpus must be reversed. On receipt of the mandate, the district court shall issue the writ, commanding the State to try Franklin within such reasonable time as the district court shall determine or to release him from any further restraint resulting from this conviction.

REVERSED, with instructions.

---

[1] He was originally scheduled to be tried in Cobb County but obtained a change of venue to Bibb County.

[2] The charge to the jury in relevant part reads as follows; the challenged intent instruction is italicized.

> The defendant's plea of not guilty which has been entered on his behalf challenges and denies every material allegation in each count of this indictment and I charge you that before the State is entitled to a verdict of conviction of this defendant at your hands upon either count of this indictment, the burden is upon the State of proving the defendant's guilt as charged in such count beyond a reasonable doubt. The State, however, is not required to prove the guilt of the defendant beyond all doubt or to a mathematical certainty. Moral and reasonable certainty is all that can be expected in a legal investigation.
>
> * * *
>
> Now, the defendant enters upon his trial with the presumption of innocence in his favor and this presumption, while not evidence, is yet in the nature of evidence and it remains with him throughout the trial, unless and until it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt.
>
> * * *
>
> Now, Ladies and Gentlemen, the burden is upon the State to prove to a reasonable and moral certainty and beyond a reasonable doubt every material allegation in each count of this indictment and I charge you further, that there is no burden on the defendant to prove anything. The burden is on the State.
>
> Now, I give you in charge, certain definitions as found in the Criminal Code of the State of Georgia.
>
> A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it

satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. *The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.* A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

* * *

As to Count II, the State contends that Raymond Lee Franklin did on or about the 17th day of January, 1979, in Cobb County, with malice aforethought, kill Claude Collie, a human being, by shooting the said Claude Collie with a certain pistol, contrary to law, thereby committing the offense of murder.

As to Count II, I charge you that the law of Georgia defines murder as follows: A person commits murder when he unlawfully and with malice aforethought either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and maligant heart.

Now, you will see that malice is an essential ingredient in murder as charged in this indictment in Count II, and it must exist before the alleged homicide can be murder. Malice in its legal sense is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this unlawful, deliberate intention should exist for any particular length of time before the killing. If it enters the mind of the slayer the moment before he fires the fatal shot or strikes the fatal blow or inflicts the fatal wound, that is sufficient.

Members of the jury, I charge you that it is not encumbent [sic] upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. The accused is not required to produce evidence of mitigation, justification or excuse on his part to the crime of murder. Whether mitigation, justification or excuse is shown by the evidence on the part of the State, it is not required of the accused to prove an absence of malice if the evidence for the State shows facts which may excuse or justify the homicide. But

it is for you, the members of the Jury, to say after a consideration of all the facts and circumstances in the case, whether or not malice, express or implied, exists in the case.

Now, members of the Jury, I charge you that if you believe beyond a reasonable doubt that Raymond Lee Franklin, in Cobb County, at any time prior to the return of this indictment, with a weapon or instrumentality named in the indictment, and with malice aforethought, either express or implied, did unlawfully and intentionally shoot and kill the deceased, Claude Collie, as charged in the indictment, and you believe the weapon or instrumentality used in the manner used, if one was used, was one likely to produce death, then you would be authorized and it would be your duty to convict the defendant of the offense of murder and in that event, the form of your verdict would be, "As to Count II, we, the Jury, find the defendant guilty."

Now, as to each count of this indictment, the defendant contends that he is not guilty of the offense charged and further contends that the State has not proved his guilt of the offenses as charged in each count to a reasonable and moral certainty and beyond a reasonable doubt, and he further contends as to Count II, the murder, that the homicide was an accident.

I charge you that a person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention of criminal negligence. An accident, in the eyes of the criminal law, is an event that takes place without one's foresight or expectation; that which takes place or begins to exist without design.

[3] The Supreme Court cited *United States v. Chiantese*, 560 F.2d 1244, 1255-56 (5th Cir. 1977), as support for its rejection of conclusive presumptions and mandatory rebuttable presumptions as quoted. In *Chiantese*, our predecessor, the former Fifth Circuit (*see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), where this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981), faced an instruction allowing a presumption of intent in the same way as did the instructions in *Sandstrom* and in the instant case. There, we used our supervisory power to require the district courts in this circuit, on pain or probable reversal, to eliminate the presumptive language. We cited with approval two jury instructions avoiding the problems, namely:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result

from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent. . . .[from *United States v. Wilkinson*, 460 F.2d 725 (5th Cir. 1972), and]

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and [any act] done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence. [from Federal Jury Practice & Instructions, § 14.13 (3d ed. 1977)].

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8022

RAYMOND LEE FRANKLIN,
Petitioner-Appellant,
versus
ROBERT FRANCIS, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION FOR REHEARING

(Opinion November 16, 1983, 11th Cir., 1983, ___ F.2d ___).

(January 9, 1984) .

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON, Senior Circuit Judge.

PER CURIAM:

The state's petition for rehearing is denied with the following observations:

The state cites *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir. 1982), *cert. denied* ___ U.S. ___, 103 S.Ct. 1276 (1983), for the proposition that the differences between the impermissible presumption instruction in *Sandstrom v. Montana*, 492 U.S. 510, 99 S.Ct. 2450 (1979), and the

instruction we found impermissible in the panel opinion were "constitutionally significant." We do not read *Lamb* as supporting this argument; in *Lamb* the challenged jury instruction on intent was not mandatory. The charge in *Lamb* simply stated, "[I]ntent . . . *may be inferred* . . . from the proven circumstances or by the acts and conduct of the defendant or *may be* presumed when it *would be* the natural and probable consequence of the particular acts." 683 F.2d at 1339 (emphasis added). We noted in *Lamb* that both parts of this instruction were permissive:

> [T]he first part of the instruction, which was not present in *Sandstrom*, is perfectly sound, constitutionally and otherwise. The import of the statement that intent "may be inferred . . . from proven circumstances or by the acts and conduct of the defendant" is simply that the jury may rely on circumstantial evidence in finding intent. In no way does the instruction suggest that the burden is on the defendant rather than the prosecution or that the circumstantial evidence need not convince the jury of the defendant's intent beyond a reasonable doubt. . . . As to the second part of the instruction, stating that intent "may be presumed when it would be the natural and necessary consequence of the particular acts," such charge was also permissive. Unlike the ambiguous direction—"the law presumes that . . ."—contained in the *Sandstrom* and *Mason* [*v. Balkcom*, 669 F.2d 222 (5th Cir. Unit B 1982), *cert. denied* ___ U.S. ___, 103 S.Ct. 1260 (1983)] instructions, the "*may be* presumed" language used here was unlikely to be interpreted by reasonable jurors as *requiring* them to drawn an inference of intent.

Id. at 1339-40 (emphasis in original). In contrast, at Franklin's trial, the judge instructed the jury that "the acts of a person . . . *are presumed* to be the product of the person's will . . . a person . . . *is presumed* to intend

the natural and probable consequences of his acts. As in *Sandstrom*, this instruction gives the jury no option whether to apply it, and is thus mandatory.

Sandstrom analysis involves classifying an instruction as permissive or mandatory, and rebuttable or irrebuttable. Permissive presumptions are generally acceptable as long as there is a rational connection between the inference and the underlying facts. *County Court of Ulster County v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224-5 (1979). The same is true of only a few mandatory presumptions: "To the extent that a presumption imposes *an extremely low burden of production—e.g., being satisfied by 'any' evidence*—it may be well that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." *Id.* at 157 n.16, 99 S.Ct. at 2225 n.16 (emphasis added), cited in *Lamb* 683 F.2d at 1338 n.9. The challenged instructions at Franklin's trial created mandatory rebuttable presumptions that placed the burden on Franklin to rebut them by more than "some" evidence, *see Sandstrom*, 442 U.S. at 517, 99 S.Ct. at 2456, and were therefore not constitutionally permissible.

The state next argues, citing *Lamb* and *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983), that if the instructions did shift the burden to Franklin to prove that he lacked intent to kill, other language in the instructions cured the defect. We note first that while the *Lamb* panel indicated that other instructions "reduced the likelihood that the jury might misinterpret the [intent] instruction," 683 F.2d at 1339, the panel did not discuss whether the other instructions would be sufficient to cure a defective instruction. Rather, the panel decided that the instruction

was not mandatory and therefore not defective. *Id.* at 1339-40.

In *Corn*, the panel did decide that other instructions cured a defective intent instruction. However, in addition to the other instructions given in Franklin's case, that we discussed in the panel opinion, Corn's jury heard a charge "replete with cautious explanations that refute Corn's claim that an irrebuttable presumption weighed against him." 708 F.2d at 559. The court quoted some of these instructions, *id.*, "by way of example:"

> [T]he instructions were clear that the accused "may" show circumstances to negate intent, "[b]ut he is not required to do so", and that he "may" show that the killing was done without malice, "[b]ut he is not required to do so." . . . [Also,] the court stated "[i]f such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist." The instruction continued, "this presumption . . . does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt the defendant was the intentional slayer."

The trial judge even instructed the jury specifically that "the burden is on the State to prove such intention beyond a reasonable doubt [and] the burden is not on the Defendant to disprove intention." *Id.* at 569. These instructions were all in addition to the general burden allocation instructions present at Franklin's trial as well as at Corn's trial, and the instruction that *criminal* intent should not be presumed, also present at both trials. In finding no reversible error in the trial judge's instructions, the *Corn* court noted in particular the above-quoted extra instruction near the end of the charge regarding the allocation of the burden to prove intent. *Id.* at 560.

In the panel opinion we discussed why the instructions that the presumption could be rebutted and that a person would not be presumed to act with criminal intention did not cure the offense intent instruction. Franklin's jury did not hear a charge containing the extra instructions set out in *Corn*.

The only extra instruction at Franklin's trial even remotely comprehensible as affecting the burden allocation on intent was the following:

> [I]t is not encumbent [sic] upon the accused to prove an absence of malice if the evidence for the prosecution shows facts which may excuse or justify the homicide. The accused is not required to produce evidence of mitigation, justification or excuse on his part to the crime of murder. Whether mitigation, justification or excuse is shown by the evidence on the part of the State, it is not required of the accused to prove an absence of malice if the evidence for the State shows facts which may excuse or justify the homicide.

However, in context these instructions all referred to the malice part of the charge. Franklin argued that he did not intend to kill Claude Collie. The damaging presumption, that a person is presumed to intend the natural and probable consequences of his acts, was not mitigated by the correct malice charge.

In summary, the events adduced at trial showed clearly that Franklin fired the shot that went through the door and killed Claude Collie. The evidence also showed that the shot coincided with Collie's slamming the door in Franklin's face. Franklin was said to have been quite nervous. Though he had the opportunity to injure others he did not. The only substantial question put to the jury was Franklin's intent. The presumptions contained in

the instructions on intent were thus extremely important to the outcome of the trial. This is not a situation where we can take lightly the dictates of *Sandstrom;* we will not find constitutionally defective instructions to be cured when we have no language from which a reasonable juror could have understood the presumption and applied it in a constitutional manner.

The Petition for Rehearing is

DENIED.

Raymond Lee FRANKLIN
Petitioner-Appellant,

v.

Robert FRANCIS, Warden,
Respondent-Appellee.

No. 83-8022.

United States Court of Appeals,
Eleventh Circuit.

Jan. 30, 1984.

Appeal from the United States District Court for the Middle District of Georgia.

ON SUGGESTION FOR REHEARING
EN BANC

(Opinion November 16, 1983, 11th Cir., 1983, 720 F.2d 1206)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is

DENIED.

SUPREME COURT OF THE UNITED STATES

No. 83-1590

Robert Francis, Warden,

Petitioner,

v.

Raymond Lee Franklin

ORDER ALLOWING CERTIORARI. Filed June 4, 1984.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eleventh Circuit* is granted.

June 4, 1984

PETITIONER'S

BRIEF

Office Supreme Court, U.S.
FILED
JUL 31 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT FRANCIS, WARDEN,
Petitioner,

v.

RAYMOND LEE FRANKLIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether the differences between the instructions on intent given in this case and those given to the jury in *Sandstrom v. Montana*, 442 U.S. 510 (1979) are constitutionally significant?

2.

Whether the United States Court of Appeals for the Eleventh Circuit misinterpreted and misapplied the "reasonable juror test" set forth by this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979), in light of the prior decision of this Court in *Cupp v. Naughten*, 414 U.S. 141 (1973)?

3.

Whether the harmless error rule of *Chapman v. California*, 386 U.S. 18 (1967) should apply to any instructions found to be unconstitutionally burdenshifting in this case, so as to require a reversal of the Eleventh Circuit's opinion granting federal habeas corpus relief?

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NO. 83-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT FRANCIS, WARDEN,
Petitioner,

v.

RAYMOND LEE FRANKLIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

This Court having granted a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on November 16, 1983, Petitioner, Robert Francis, prays that the judgment granting federal habeas corpus relief be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported in *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983) and is set forth in the Joint Appendix. Also set forth in the Joint Appendix is a copy of the Order of the United States Court of Appeals for the Eleventh Circuit entered on January 9, 1984 denying Petitioner's petition for rehearing. Also set forth in the Joint Appendix is a copy of the Order of the United States Court of Appeals for the Eleventh Circuit, dated

January 30, 1984, denying Petitioner's suggestion for rehearing *en banc*. The opinion of the district court denying the Respondent's application for federal habeas corpus relief is unreported, but is contained in the Joint Appendix.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 16, 1983. *See Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983). A timely petition for rehearing was denied on January 9, 1984. (See Joint Appendix). A timely petition for rehearing *en banc* was denied on January 30, 1984. (See Joint Appendix).

This petition for a writ of certiorari was timely filed within the allowable ninety days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The petition for a writ of certiorari was granted by this Court on June 4, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION

O.C.G.A. § 16-5-1:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

STATEMENT OF THE CASE

Respondent, Raymond Lee Franklin, was indicted in Cobb County, Georgia, during the January Term of 1979 for the kidnapping of Carol Heitmuller (Count I) and the murder of Claude Collie (Count II). A motion for change of venue filed by Respondent was granted and Respondent's trial was conducted in Bibb County, Georgia. Following a jury trial, Respondent was found guilty on both counts and received the death penalty for murder and a twenty year consecutive sentence for kidnapping. Respondent pursued his direct appeal to the Supreme Court of Georgia which affirmed his convictions and sentences in *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980). This Court denied Respondent's petition for a writ of certiorari on June 16, 1980. *See Franklin v. Georgia*, 447 U.S. 930 (1980).

A petition for a writ of habeas corpus was filed on March 27, 1981 in the Superior Court of Butts County, Georgia. Following a hearing, the state habeas corpus court denied Respondent state habeas corpus relief on September 10, 1981. Respondent's application for a certificate of probable cause to appeal to the Supreme Court of Georgia was denied on November 1, 1981. A petition for a writ of certiorari was denied by this Court in *Franklin v. Zant*, 456 U.S. 938 (1982).

Respondent filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Macon Division on May 14, 1982. On December 9, 1982, the district court denied Respondent's application for federal habeas corpus relief and entered judgment on behalf of Petitioner. The district court granted Respondent's application for a certificate of probable cause to appeal on January 4, 1983.

Following briefing and oral argument in the United States Court of Appeals for the Eleventh Circuit, a panel of that Court entered a decision on November 16, 1983, directing that the district court's order denying the writ of habeas corpus be reversed and that the district court issue the writ, commanding the state to retry Respondent within a reasonable time or release him from any further restraint resulting from his conviction. *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983).

A suggestion for rehearing and rehearing *en banc* was filed on behalf of the Petitioner. The petition for rehearing was denied by order of the United States Court of Appeals for the Eleventh Circuit dated January 9, 1984. (Appendix A). Petitioner's suggestion for rehearing *en banc* was denied by order of the United States Court of Appeals for the Eleventh Circuit dated January 30, 1984. (Appendix B). The basis for the granting of the writ of habeas corpus was a finding by the panel that the trial court's charge on intent impermissibly shifted the burden of proof to the Respondent in violation of the principles set forth by this Court in its decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). On June 4, 1984 this Court granted the petition for a writ of certiorari and oral argument on the petition was granted at the same time.

A review of the evidence presented at Respondent's trial shows the following:

On the morning of January 17, 1979, Burnis Campbell and Deputy Kenny King of the Cobb County Sheriff's Department transported four Cobb County jail inmates to the dental office of Dr. Daniel Busch for treatment. (T. 277, 295). The inmates, one of whom was Respondent, were secured together on a common chain. (T. 277). After the first inmate had seen the dentist, returned to the lobby and was secured to the chain, Respondent was released. (T. 278, 296). Respondent used the restroom, received an injection from Dr. Busch to numb his mouth and was escorted by Sergeant Campbell back to the lobby. (T. 278-296).

The first inmate was released again and escorted to the treatment room by Sergeant Campbell. (T. 279, 297). During this time, Respondent grabbed Deputy King's .357 magnum pistol from behind, ordered King to get on the floor and told another inmate to get King's keys. (T. 279-280). The remaining two inmates unlocked their cuffs and under Respondent's bidding took King's and Campbell's wallets and Campbell's pistol. (T. 281, 286, 298).

Both Dr. Busch and his assistant, Carol Heitmuller, heard a commotion in the lobby when Respondent took King's pistol. (T. 310, 332). They testified that Respondent then appeared in the doorway brandishing a gun and directing Dr. Busch to pull the phone out of the wall. (T. 313, 333). Respondent ordered them and Sergeant Campbell to lie on the floor. (T. 297, 313, 333). Ms. Heitmuller further stated that Respondent said he was in for life and had nothing to lose. (T. 313). Respondent tore out the other phone in the lobby and asked

Dr. Busch for his car keys. (T. 298, 314, 334). Either Respondent or another inmate got Dr. Busch's keys from his desk. (T. 314, 334). Respondent then told Ms. Heitmuller to leave with him. (T. 298, 314, 334). Respondent took the dental assistant by her arm, with the pistol placed against her side and went outside to Dr. Busch's car. (T. 335). A short while later, King heard two or three gunshots. (T. 282, 288).

According to Ms. Heitmuller's testimony, Respondent had trouble finding the right keys to the car on the key ring and became upset. (T. 336-337). Respondent told the assistant that they were going up the hill; he and Ms. Heitmuller began to run up the hill and through a wooded area. (T. 338, 340). Respondent kept the pistol pointed at Ms. Heitmuller throughout their journey into the woods. (T. 339). At one point, they came upon a certain John Dempsey who was standing at the road near his house and Respondent asked Dempsey for his car. (T. 340, 356). After Dempsey replied that he didn't have one, Respondent and Ms. Heitmuller continued until they reached the Collie home. (T. 340, 356-357). Dempsey stated that he heard two gunshots shortly thereafter. (T. 357).

Ms. Heitmuller testified that upon reaching the Collie home, Respondent knocked on the door and a man opened it. (T. 340-341). Respondent asked for a car, the man slammed the door and Respondent fired a shot. (T. 341). Ms. Heitmuller heard the door's glass pane shatter and a moan. (T. 341). After hearing a second shot, she started running and found refuge in a neighbor's house. (T. 341-342, 382).

Dempsey stated that after hearing the gunshots, the victim's wife and daughter came outside screaming that

a man had shot Collie. (T. 357). Dempsey then saw Respondent run away from the house. (T. 358). Another neighbor, Liz Howard, also heard two gunshots and saw a man run down the hill carrying a gun and enter the woods. (T. 384, 385).

Mrs. Ollie Collie stated that she and her 73 year old husband of fifty years were watching television when Collie answered a knock at the front door. (T. 374). Mrs. Collie went into the bedroom and heard a gunshot. (T. 374). She returned to the living room where she saw her husband collapse after saying, "I been shot." (T. 375). She heard a second shot and called out to her daughter, Gladys, who was in her bedroom. (T. 375).

Gladys Collie testified that she heard someone kicking the door followed by two gunshots. (T. 363). She went to the living room where she saw her father on the floor, then looked out the door and saw Respondent by her car. (T. 363). After shouting to Respondent that he had killed her father, Respondent came into the house and pointed the gun at her head and cocked the hammer. (T. 363). Both mother and daughter ran into other rooms to escape Respondent who followed Gladys until she ran from the house. (T. 363, 375). Mrs. Collie came out to the kitchen where Respondent held the gun to her head and asked for the car keys. (T. 375, 376). Mrs. Collie further stated the Respondent told her he might as well kill her. (T. 375). She went out the front door and Respondent left. (T. 376).

An autopsy performed by Dr. Joseph Burton, Chief Medical Examiner in DeKalb and Cobb Counties, revealed an entry bullet wound in the victim's left chest. (T. 485). The bullet had passed through the chest bruising the left lung, entered the heart sac, then passed into

the right lung. (T. 486). The bullet's metal jacket had remained in the lung but the lead core continued into the victim's back area where it was removed. (T. 486). The asymetrical entry wound, according to Dr. Burton, indicated that there was an intermediary target between the weapon and the victim. (T. 488).

Respondent was captured shortly after 8:00 p.m. on January 17 behind a shoe store on Canton Highway after attempting to get in a car driven by a woman outside Wendy's restaurant and being seen running down the highway by two customers at Wendy's. (T. 392-393, 396, 401, 404-405, 412). Respondent's .357 magnum pistol was found several feet from where Respondent was captured. (T. 406, 420).

Respondent was advised of his constitutional rights and made a statement after his capture. (T. 434). Following a *Jackson v. Denno* hearing on Respondent's voluntariness in giving the statement, the Court ruled the statement voluntary and admissible. (T. 434-445). The statement was presented to the jury. (T. 455).

According to Respondent's statement, Respondent had planned an escape with another inmate known as "Pee Wee" at the first good opportunity. (T. 462, 470). While waiting for Deputy King to secure Respondent to the chain at the dental office, Respondent grabbed King's gun and told "Pee Wee" to get the keys, undo the cuffs and get Sergeant Campbell's gun. (T. 463). Respondent took the deputies' wallets. (T. 463). After obtaining the dentist's keys, Respondent went to the car with the dental assistant but was unable to find the right keys. (T. 464). Respondent and the assistant ran up a hill and passed a man who was asked by Respondent for a car.

(T. 464). The man did not have one, so Respondent and the assistant continued to a house where Respondent saw some cars. (T. 464).

Respondent told the man at the house to give him some car keys, the man slammed the door and the gun "went off," according to Respondent. (T. 464). The gun "went off" again and the Respondent went into the house looking for car keys. (T. 465). Respondent asked an elderly woman inside for keys, but when she said she didn't have any, Respondent left and ran through the woods. (T. 465, 466). He came to a boat in the garage where he hid for several hours, after which he returned to the dentist office. (T. 466, 467). He knocked on the window of a car parked outside Wendy's but the woman drove off. (T. 467). Respondent then went across the highway where he was caught by police. (T. 467-468).

The gun recovered by police where Respondent was captured had two spent shells and four live rounds. (T. 421, 502). Crime lab tests revealed that the bullet removed from the body had been fired by the .357 magnum pistol found near Respondent. (T. 516). An examination of the screen door to the Collie home showed that the gun had been fired with the muzzle close to or next to the door. (T. 518). Two bullets had passed through the screen door, front door and door curtain, one bullet striking Collie and the other bullet lodging in the ceiling. (T. 429, 520).

Detective Ronnie Bass testified that police searched the boat where Respondent had hidden and discovered a fresh footprint in the boat and that the boat's canvas cover had been moved. (T. 504). Several items were found in the boat including a deputy's identification badge and wallet, and Respondent's Cobb County jail

identification bracelet. (T. 505).

The defense rested without presenting any testimony or evidence. (T. 533).

Any additional facts will be referred to as necessary for a discussion of the issues raised on behalf of the Petitioner.

SUMMARY OF THE ARGUMENT

1.

The instructions to the jury which were given in this case, when properly considered as a whole, are distinguishable from the instructions found to be unconstitutionally burdenshifting in *Sandstrom v. Montana*, 442 U.S. 510 (1979). The differences between the instructions given in this case and those presented to this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979), are constitutionally significant, so as to prevent the charge from having the effect of improperly shifting the burden of proof to the Respondent. Petitioner respectfully submits that the holding of this Court in *Sandstrom v. Montana*, *supra* is narrowly drawn and was not intended to include instructions of the type presented in this case, where the jury is specifically informed that any presumptions are rebuttable and that a person is not presumed to act with criminal intention.

2.

The United States Court of Appeals for the Eleventh Circuit misinterpreted and misapplied the "reasonable juror" test set forth by this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979). Under the analysis utilized by the Eleventh Circuit, a charge containing any mandatory language would automatically be found to be unconstitutionally burdenshifting under *Sandstrom v. Montana*, regardless of the content of the remainder of the instructions given to the jury. Further, under the Eleventh Circuit's analysis, it would have to be assumed that the jury applied any allegedly mandatory presumption, regardless of the trial court's charge considered as a whole.

3.

The harmless error rule of *Chapman v. California*, 386 U.S. 18 (1967), was properly examined by the United States Court of Appeals for the Eleventh Circuit, but the Eleventh Circuit erred in finding that the harmless error rule did not prohibit the reversal of Respondent's convictions. In light of the overwhelming nature of the evidence presented of Respondent's guilt and the patently frivolous nature of Respondent's defense, it is clear that the circumstances of this case provide an appropriate setting for the application of the harmless error rule of *Chapman v. California*, *supra*.

ARGUMENT

I. THE DIFFERENCES BETWEEN THE INSTRUCTIONS ON INTENT GIVEN IN THIS CASE AND THOSE GIVEN TO THE JURY IN *SANDSTROM V. MONTANA*, 442 U.S. 510 (1979) ARE CONSTITUTIONALLY SIGNIFICANT.

In *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983), a panel of the United States Court of Appeals for the Eleventh Circuit concluded that the trial court's charge on intent given during the guilt-innocence phase of Respondent's trial impermissibly shifted the burden of proof to the Respondent in violation of the principles set forth by this Court in *Sandstrom v. Montana*, 442 U.S. 510

(1979). The trial court's entire charge to the jury during the guilt-innocence phase of the trial is set forth in the Joint Appendix. The portion of the charge alleged to be unconstitutionally burden-shifting reads as follows:

> A crime is a violation of a statute of this State in which there shall be a union of joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. *The acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.* A person will not be presumed to act with criminal intention but the trier of facts, that is the jury may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all of the circumstances connected with the act for which the accused is prosecuted.

In considering this charge on direct appeal, the Supreme Court of Georgia found the charge to be distinguishable from that presented to this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979), in light of this Court's decision in *Cupp. v. Naughten*, 414 U.S. 141 (1973). *See Franklin v. State*, 245 Ga. 141, 154, 263 S.E.2d 666 (1980).[1]

[1] This charge had been previously held to be nonburden-shifting in light of this Court's decision in *Sandstrom v. Montana, supra*, in an earlier decision rendered by the Supreme Court of Georgia, i.e., *Skrine v. State*, 244 Ga. 520, 260 S.E.2d 909 (1979). In *Skrine v. State, supra*, the Supreme Court of Georgia held that this charge created "a permissive presumption" of the type found to be allowable under this Court's decision in *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). *Skrine v. State, supra* at 521.

The distinguishing factors noted by the Supreme Court of Georgia were that the charge in this case properly explained to the jury that criminal intent is not presumed, that the presumptions were rebuttable, and clearly informed the jury that there was no burden on the Respondent to prove anything. *Franklin v. State, supra* at 154. Petitioner contends that these distinctions recognized by the Supreme Court of Georgia in its decision are constitutionally significant and establish that this charge, unlike that presented in *Sandstrom v. Montana, supra*, was not unconstitutionally burdenshifting. The decision of the Supreme Court of Georgia, focusing on the language of the trial court's charge and contrasting it with the language utilized in *Sandstrom v. Montana, supra*, is in line with the admonition given by this Court in *Sandstrom v. Montana, supra*, that in determining the nature of a presumption, there must be ". . . careful attention to the words actually spoken to the jury. . . ." *Sandstrom v. Montana, supra*, at 514. Of course, under the prior decision of this Court in *Cupp v. Naughten*, a challenged jury instruction must be viewed as a whole in order to determine whether or not a defendant's right to due process has been violated. *Id.* at 146.

As already noted, in that portion of the charge dealing with the principle of intent, the language of the charge was distinguishable from that presented to this Court in *Sandstrom v. Montana*. Unlike the jury in *Sandstrom v. Montana, supra*, the jury in this case was not only told that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but also were informed that the presumption may be rebutted. (See Joint Appendix). The jury was not only told that a person of sound mind and discretion is pre-

sumed to intend the natural and probable consequences of his acts, but was also told that the presumption may be rebutted. (See Joint Appendix). Immediately following the challenged portion of the charge on intent, the jury was specifically informed that:

> A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all of the circumstances connected with the act for which the accused is prosecuted.

Therefore, if careful attention is paid to the actual words spoken to the jury, it can be seen that the jury was clearly informed, even in the challenged portion of the trial court's instructions on intent, that both of the presumptions were rebuttable and that a person would not be presumed to act with criminal intention. This is a significant distinction from the instruction reviewed by this Court in *Sandstrom v. Montana, supra.*

Additionally, examining the trial court's charge as a whole, there were additional significant instructions for the jury's consideration including standard charges on the burden of proof being upon the State to establish Respondent's guilt beyond a reasonable doubt. (See Joint Appendix). A standard charge on the presumption of innocence existing in favor of the Respondent (See Joint Appendix) and the definition given to the jury of a "crime" as being a union of a joint operation of act or omission to act and *intention* or criminal negligence. (See Joint Appendix). Following the trial court's charge on intent, during the portion of the charge on malice, also an essential element of the crime of murder under Georgia law, the jury was told that, "the accused is not required to produce evidence of mitigation, justification or excuse on his part to the crime of murder." (See Joint Appendix).

It should be noted that in the initial portion of the trial court's instructions to the jury, the court stated, ". . . and I charge you further that there is no burden on the defendant to prove anything. The burden is on the State." (See Joint Appendix).

Therefore, simply on the face of the instructions, read as a whole as required by *Cupp v. Naughten, supra,* the language of the challenged presumption was distinguishable from that presented to this Court in *Sandstrom v. Montana, supra.* Unlike the jury in *Sandstrom v. Montana, supra,* the jury in this case was clearly told that the burden was not on the defendant to prove anything but that they could infer certain matters from the evidence based on the presumptions, or these presumptions might be rebutted from the evidence presented. *See Sandstrom v. Montana, supra,* at 515.

Petitioner urges this Court to limit its holding in *Sandstrom v. Montana, supra,* to cases involving the clearly mandatory language utilized in *Sandstrom v. Montana, supra,* where no clarifying instructions were given, even considering the charge as a whole. Petitioner urges this Court not to extend the holding in *Sandstrom v. Montana, supra,* so as to require a finding that a jury charge is unconstitutional if a presumption is charged concerning an essential element of the offense, but the jury is also informed that these presumptions are rebuttable and that a person is not presumed to act within criminal intention.

As this Court noted in *County Court of Ulster County*

v. Allen, 442 U.S. 140, 156 (1979), "inferences and presumptions are a staple of our adversary system of fact-finding." And this Court went on to note that the most common type of inference or presumption is the permissive type which allows, but does not require the trier of fact to infer an elemental fact from proof by the prosecutor and places no burden on a defendant. *Id.* at 157. Due to the additional language contained in this charge, Petitioner submits, as is argued more fully *infra*, that due to the language of the trial court's charge as a whole, including language not contained in the trial court's charge to the jury in *Sandstrom v. Montana, supra*, that the trial court's instructions in this case were permissive in nature and therefore, not constitutionally intolerable. As will also be argued more fully, *infra*, Petitioner contends that some "mandatory" language in the form of such phrases as "are presumed" does not necessarily render a charge unconstitutionally burdenshifting, when the jury is specifically informed that the presumptions are rebuttable, that a person is not presumed to act with criminal intention, and where there have been general instructions clearly informing the jury of the State's burden of proof as to each essential element of the crime and the defendant's presumption of innocence.

Petitioner urges this Court to find that the differences in the instructions given on intent in this case, as compared to those given in *Sandstrom v. Montana, supra*, are constitutionally significant so as to require a reversal of the finding by the United States Court of Appeals for the Eleventh Circuit that the charge on intent impermissibly shifted the burden of proof to the Respondent in violation of *Sandstrom v. Montana, supra.*

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT MISINTERPRETED AND MISAPPLIED THE "REASONABLE JUROR TEST" SET FORTH BY THIS COURT IN *SANDSTROM V. MONTANA*, 442 U.S. 510 (1979), IN LIGHT OF THE PRIOR DECISION OF THIS COURT IN *CUPP V. NAUGHTEN*, 414 U.S. 141 (1973).

Petitioner contends that the United States Court of Appeals for the Eleventh Circuit in its decision in *Franklin v. Francis, supra*, improperly refused to consider the trial court's charge as a whole, as is required under *Cupp v. Naughten*, 414 U.S. 141 (1973). In *Cupp v. Naughten*, *supra*, this Court specifically held that challenges to portions of a trial court's instructions to the jury must not be viewed in "artificial isolation", but rather, must be viewed in light of the instructions as considered as a whole. *Id.* at 146-147. This Court in *Cupp. v. Naughten*, *supra*, also noted:

> The question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *Id.* at 147, 94 S.Ct. at 400. *Accord, Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736 (1977).

As the United States Court of Appeals for the Eleventh Circuit noted in *Lamb v. Jernigan*, 683 F.2d 1332, 1339 (11th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1276 (1983), *Cupp. v. Naughten*, *supra* and *Henderson v. Kibbe*, *supra*, mandate that in reviewing these instructions that courts ". . . Consider the effect even of patently erroneous instructions in light of the remainder of

the charge and the entire trial." *Id.*[2] Instead of reviewing the trial court's instructions as a whole, or determining whether or not a reasonable juror would interpret these instructions as containing a mandatory or permissive presumption, the United States Court of Appeals for the Eleventh Circuit simply delineated what it found to be a burdenshifting instruction on intent and then stated that permissive language contained in the instructions considered as a whole did not "cure" the allegedly mandatory rebuttable presumption contained in one phrase of the trial court's instructions to the jury. *Franklin v. Francis, supra,* at 1211-1212. Petitioner contends that in ignoring the trial court's charge as a whole in making the threshold determination of whether or not a mandatory presumption had been created, the United States Court of Appeals for the Eleventh Circuit rendered inoperable the "reasonable juror standard" set forth by this Court in *Sandstrom v. Montana, supra.*

In so doing, the decision of the United States Court of Appeals for the Eleventh Circuit not only conflicted with numerous Georgia decisions finding such a charge to be constitutionally permissible under this Court's decision in *Sandstrom v. Montana, supra,* such as *Skrine v. State, supra,* but the decision also conflicted with other decisions rendered by the United States Court of Appeals for the Eleventh Circuit, including *Lamb v. Jernigan,* 683 F.2d 1332, 1337 (11th Cir. 1982), *cert. denied,* ____ U.S.

[2] In *Lamb v. Jernigan, supra,* the trial court charged the jury that intent "may be presumed when it would be the natural and necessary consequence of the particular acts." The Eleventh Circuit found that the instruction "was not reasonably susceptible of an interpretation that relieved the prosecution of its burden of proving intent beyond a reasonable doubt or otherwise undermined the fact finding responsibility of the jury." *Lamb v. Jernigan, supra,* at 1340.

____, 103 S.Ct. 1276 (1983); *Hance v. Zant,* 696 F.2d 940 (11th Cir. 1983); and *Corn v. Zant,* 708 F.2d 549 (11th Cir. 1983), *cert. denied* May 29, 1984.

Petitioner contends that the Court in *Franklin v. Francis, supra,* took an improper approach in light of *Sandstrom v. Montana,* by highlighting language which might have the effect of a mandatory presumption and then determining that because there was "conflicting language" allegedly making it impossible for the court to tell which presumption was applied, the charge was thus impermissibly burden shifting. Petitioner contends that the proper approach under the "reasonable juror" test set forth by this Court in *Sandstrom v. Montana, supra,* was to review the trial court's charge as a whole to determine whether or not the challenged instruction had a "mandatory effect". In this case, Petitioner contends that a review of the challenged instruction in light of the trial court's charge as a whole leads inexorably to the conclusion that no mandatory presumption was created by means of the challenged language, but rather, any alleged mandatory effect contained in these phrases considered in artificial isolation, was dispelled by the other instructions which clearly informed the jury that the presumptions were rebuttable and that the Respondent would not be presumed to act with criminal intention.

The "reasonable juror test" set forth by this Court in *Sandstrom v. Montana, supra* required that the nature of a presumption be determined by the manner in which a reasonable juror would have interpreted the instruction, based on a review of the actual words spoken to the jury. Far from applying this test, the United States Court of Appeals for the Eleventh Circuit simply isolated the

mandatory language of "is presumed", without regard to the phrase informing the jury that the presumption was rebuttable and found that it would have to be assumed that the jury applied the presumption, regardless of the content of the remainder of the instructions given to the jury. Instead of applying a "reasonable juror standard", it appears that the United States Court of Appeals for the Eleventh Circuit was actually applying one of two standards to the instructions; standards at opposite ends of the spectrum. First, it appears that the United States Court of Appeals for the Eleventh Circuit was assuming that regardless of the content of the charge as a whole, that any juror might view the charge as mandatory because of the mandatory phrases contained therein and therefore, the charge was burdenshifting. The "any juror" approach assumes that any mandatory language would automatically be considered as burdenshifting by jury members. At the opposite end of the spectrum, the approach utilized by the Eleventh Circuit appears to incorporate a "no juror" standard, i.e., a standard in which the court assumes that no juror could have made the fine legal distinctions required to resolve any conflicting language contained in the charge and therefore, if there is any mandatory language, the charge must be found to be burdenshifting. Under either form of analysis, utilized by the United States Court of Appeals for the Eleventh Circuit, a charge containing any mandatory language would thus be impermissibly burden shifting under *Sandstrom v. Montana*, because it would have to be assumed that the jury applied the mandatory presumption, regardless of the content of the remainder of the instructions given to the jury.

Utilizing the "reasonable juror" test, Petitioner submits that unlike the finding made by this Court in *Sandstrom v. Montana*, *supra* at 515, it is not clear that a reasonable juror could easily have viewed this instruction as mandatory, considering the instructions as a whole.

In this regard, Petitioner respectfully directs this Court's attention to the interpretation of the "reasonable juror" standard made by Senior Circuit Judge Floyd R. Gibson in his dissenting opinion in *Patterson v. Austin*, 728 F.2d 1389 (11th Cir. 1984). In *Patterson v. Austin*, *supra*, the trial court's charge on intent was alleged to be unconstitutionally burdenshifting under *Sandstrom v. Montana* and a panel of the court so found.[3] In his dissenting opinion in *Patterson v. Austin*, *supra*, Senior Circuit Judge Gibson commented on the decision of the United States Court of Appeals for the Eleventh Circuit in *Franklin v. Francis*, *supra*, and stated

> "However, I would disagree with *Franklin* if it is interpreted to mean instructions that a presumption 'may be rebutted' and that 'a person is not presumed to act with criminal intention' are wholly irrelevant to the determination of whether a reasonable juror would view the overall instruction as containing a permissive as opposed to mandatory presumption on intent. I think a 'reasonable juror' would evaluate those instructions right along with other instructions directing that intent '*may be*', but not '*must be*' presumed." A major difficulty I have with the approach taken by the majority is that it sets such an amorphous standard for what "a reasonable juror" would think as to deprive the term "reasonable" of its well understood meaning. I find it incredible that the "reasonable juror" the ma-

[3] A suggestion for rehearing *en banc* has been filed on behalf of the Respondent in *Patterson v. Austin*, *supra* and is presently pending in the United States Court of Appeals for the Eleventh Circuit.

jority speaks of would even be able to ascertain the critical distinction between an instruction which mandates "an inference on intent and one which merely 'permits' an inference on intent. See *Sandstrom*, 442 U.S. at 527-28, 99 S.Ct. at 2461 (Rehnquist J, concurring). Presumably, the majority would agree that the instruction found objectionable here would have been constitutional had the references to 'presume' been preceded by the qualifying term 'may'. *See Franklin v. Francis*, 723 F.2d 770 (11th Cir. 1984) (percuriam; denying rehearing *en banc*). I believe that a juror who could seize the significance of this distinction would also recognize the overriding importance of the last and twice given instruction that "a person shall not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of words, conduct, demeanor and other circumstances connected with the act for which the accused is prosecuted".

Petitioner respectfully submits that the approach taken by Senior Circuit Judge Gibson in his dissenting opinion is correct and that the sophisticated distinctions placed on a "reasonable juror" by the United States Court of Appeals for the Eleventh Circuit undermine the test as set forth in *Sandstrom v. Montana*, *supra*, so as to find unconstitutional charges which were never contained within the narrow confines of this Court's original decision in *Sandstrom v. Montana*, *supra*. Rather, Petitioner submits that the trial court's instruction as a whole, clearly meets the "reasonable juror" test set forth in *Sandstrom v. Montana*, *supra*, and that if the United States Court of Appeals for the Eleventh Circuit had properly applied this test, habeas corpus relief would not have been granted by that Court.

III. THE HARMLESS ERROR RULE OF *CHAPMAN V. CALIFORNIA*, 386 U.S. 18 (1967) SHOULD APPLY TO ANY INSTRUCTIONS FOUND TO BE UNCONSTITUTIONALLY BURDENSHIFTING IN THIS CASE, SO AS TO REQUIRE A REVERSAL OF THE ELEVENTH CIRCUIT'S OPINION GRANTING FEDERAL HABEAS CORPUS RELIEF.

In *Connecticut v. Johnson*, ___ U.S. ___, 103 S.Ct. 969 (1983), this Court was equally divided with respect to whether or not the harmless error test of *Chapman v. California*, 386 U.S. 18 (1967) can be applied to alleged *Sandstrom* violations and, if so, under what circumstances the harmless error test will be utilized. In the decision of the United States Court of Appeals for the Eleventh Circuit in *Franklin v. Francis*, *supra*, the court squarely reached the harmless error issue based on precedent within the circuit as contained in *Lamb v. Jernigan*, 683 F.2d 1332, 1337 (11th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1276 (1983). Petitioner contends that although the Eleventh Circuit properly reviewed the evidence to determine if harmless error would prevent the reversal of Respondent's conviction based on a finding that there had been *Sandstrom* error in the case, the Eleventh Circuit incorrectly held that, "because intent was plainly at issue in this case, and was not overwhelmingly proved by the evidence (thus constituting harmless error under *Lamb*), we cannot find this error to be harmless." *Franklin v. Francis*, *supra*, at 1212.

With respect to whether or not the harmless error rule should be applied to cases in which *Sandstrom* violations have been found, Petitioner submits that where there is overwhelming evidence as to a defendant's guilt, the harmless error rule of *Chapman v. California*, is properly applicable. In footnote 13 of the plurality opinion in

Connecticut v. Johnson, supra the Court quoted an article from the Rutger's Law Review for the proposition that, "the pivotable concept of *Sandstrom* is that the *possibility* that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion." *Connecticut v. Johnson, supra,* at 977, n. 13. Petitioner submits that when there is overwhelming evidence of a criminal defendant's guilt, the possibility is removed that the jury reached its decision based solely on the mandatory or conclusive presumption, rather than on the nature of the evidence.

As Mr. Justice Powell noted in his dissenting opinion in *Connecticut v. Johnson, supra,* "contrary to the plurality's assumption, a *Sandstrom*-type presumption does not operate independently of the evidence. The jury must look to the evidence initially to see if the basic facts have been proved before it can consider whether it is appropriate to apply the presumption." *Id.* at 982. This statement by Mr. Justice Powell recognizes the primary function of the jury as a fact finder. Petitioner respectfully submits that the jury looks to the evidence to determine what facts have been proven by the State, and only if there are shortcomings in the evidence does a reasonable juror look to the presumption to determine if a second set of facts can be assumed based on proof of an initial set of facts. Petitioner submits that just as in determining whether or not there has been a *Sandstrom* violation, a "reasonable juror" test must be applied in the harmless error arena also, so that it must be assumed that jurors act reasonably by reviewing the evidence as a whole, and then determining in what manner, if any, the State's proof is lacking. As Mr. Justice Powell

noted in his dissenting opinion in *Connecticut v. Johnson,* in order to apply the presumption that a person intends the natural and necessary consequences of his acts, a jury must examine the facts and circumstances to determine what actions the defendant took, i.e., the character and quality of his acts, so that the natural and necessary consequences of the act can be determined. *Id.* at 983.

As the plurality opinion in *Connecticut v. Johnson, supra* stated, in footnote 14, the conceptualization of a fair trial includes an implicit understanding that the jury has understood and applied the law to all material issues in the case. *Connecticut v. Johnson, supra* at 977, n. 14. Therefore, it must be assumed that the jury is reasonable, i.e., that it did not operate so as to eliminate from its consideration any of the material issues in the case, but rather examined all the evidence and determined, in light of the State's burden of proof and the defendant's presumption of innocence, whether or not the evidence supported the verdict. In other words, it must be assumed that the jurors reviewed all the evidence in the case and determined whether or not the evidence was sufficient. Therefore, the operation of even a conclusive presumption would not prevent the jury from considering any evidence, but rather would merely affect the inferences that could be drawn from the basic facts presented. Therefore, Petitioner urges this Court to find that the harmless error rule is applicable in cases in which a *Sandstrom* violation has been found.

With respect to the application of the harmless error rule of *Chapman v. California, supra,* to the facts of this case, Petitioner submits that, contrary to the holding of the Eleventh Circuit, the evidence of Respondent's guilt was overwhelming. First, the evidence does not establish,

as was found by the United States Court of Appeals for the Eleventh Circuit, that Respondent fired the first shot due to the slamming of the door. When Respondent asked the victim for his car, the victim slammed the door to his home, then Respondent fired a shot. (T. 341). A second gunshot followed. (T. 341-342, 382). Following the two shots, Respondent entered the home of the victim and chased the victim's wife and daughter, with Respondent telling the victim's wife he might as well kill her. (T. 363-375).

Respondent's only defense was that the gun "went off" when the man slammed the door. (T. 464). Petitioner submits that this defense was patently frivolous and the fact that the two shots were fired, one of which killed Mr. Collie, clearly establishes Respondent's intent to kill the victim, especially when viewed in light of the fact that immediately following the killing of Mr. Collie, Respondent informed the victim's wife that he might as well kill her.

Respondent's statement made after his capture and after having been advised of his constitutional rights was ruled to be voluntary and admissible and was presented to the jury at Respondent's trial. (T. 434-445, 455). According to Respondent's statement, Respondent told the victim, Mr. Collie "to give him some car keys, the man slammed the door and the gun 'went off.'" (T. 464). According to Respondent, the gun "went off" again and Respondent went into the house looking for the victim's car keys. (T. 465). The Respondent asked the victim's wife, who was inside the house, for the keys, but when she said she didn't have any, Respondent left and ran through the woods. (T. 465, 466). An examination of the screen door to the Collie home indicated that the gun

had been fired with the muzzle close to or next to the door. (T. 518). Two bullets had passed through the screen door, front door, and door curtain, one bullet having struck the victim and the other bullet having lodged in the ceiling. (T. 429, 520). The defense rested without presenting any testimony or evidence. (T. 533).

Petitioner submits that the evidence was overwhelming as to Respondent's guilt, in light of the two bullets fired in the direction of the victim, one of which killed him, and in light of Respondent's actions immediately following the killing of the victim, i.e., threatening the victim's wife and daughter, as well as in light of the patently frivolous nature of Respondent's defense. For these reasons, Petitioner submits that this Court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit finding that the harmless error rule did not preclude a reversal of Respondent's conviction based on an alleged *Sandstrom* violation.

CONCLUSION

For all of the above and foregoing reasons, Petitioner respectfully submits that the decision of the United States Court of Appeals for the Eleventh Circuit granting Respondent federal habeas corpus relief should be reversed and that Respondent's convictions and sentences should be upheld.

Respectfully submitted,

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This 30th day of July, 1984.

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RESPONDENT'S

BRIEF

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No. 83-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT FRANCIS, WARDEN,

Petitioner,

—v.—

RAYMOND LEE FRANKLIN,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court's charge to Respondent's jury violate his due process rights as articulated in Sandstrom v. Montana, 442 U.S. 510 (1979), because a reasonable juror could have interpreted it as effectively shifting the burden of persuasion regarding Respondent's intent to kill?

2. Is it harmless error beyond a reasonable doubt, under Chapman v. California, 386 U.S. 18 (1967), when an unconstitutional jury charge effectively shifts the burden of persuasion with respect to an essential element of the alleged offense and that element is the principal, highly-disputed matter at issue?

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No. 83-1590

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT FRANCIS, WARDEN,

Petitioner,

v.

RAYMOND LEE FRANKLIN,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE CASE

A. Evidence At The Guilt-Determination Phase Of The Trial

Respondent Raymond Lee Franklin

("Respondent"), a 21-year old youth being held in the Cobb County Jail, attempted to escape from the custody of two Cobb County deputies on January 17, 1979, while undergoing emergency dental treatment along with three other prisoners at a local dentist's office. (Tr. T. 276-77).[1] Each prisoner was secured by a handcuff to an eight-foot length of chain (Tr. T. 277). After another prisoner had seen the dentist, Respondent was released from the chain in the reception area and was escorted to the dental chair (Tr. T. 278-79),

1. Each reference to the transcript of Respondent's state trial held on April 23-26, 1979, in the Superior Court of Cobb County, will be indicated by the abbreviation "Tr. T.," followed by the number of the referred-to page.

where he received X-rays and four or five injections of carbocaine (a drug similar to Novocain) (Tr. T. 302, 310). Respondent was then escorted back to the reception area to wait for the drug to take effect. (Tr. T. 278-79, 310.) As another inmate was being uncuffed to be taken to the dentist's chair, Respondent, who had not been rechained, suddenly grabbed a .357 pistol from the holster of Deputy Kenneth King (Tr. T. 279) and told the deputy to lie face-down on the floor (Tr. T. 280). Respondent then stepped into the doorway leading to the dental chair and told Sergeant Burris Campbell to lie face-down on the floor. (Tr. T. 297.) At Respondent's direction, the remaining prisoner was released (Tr. T. 280-81), Sergeant Campbell's pistol was

taken (Tr. T. 297-98), and the officers' wallets were seized (Tr. T. 281).

Respondent, who had directed Dr. Daniel Busch and his dental assistant to lie down on the floor (Tr. T. 313), asked Dr. Busch for his wallet and his automobile keys (Tr. T. 314). After learning that the dentist carried no wallet, Respondent took the dentist's keys from a desk top and left the office with another prisoner. (Tr. T. 282, 314.) As they were leaving, Respondent turned to Carol Heitmuller, Dr. Busch's dental assistant, took her arm and said, "Get up. you're coming with us, get your purse." (Tr. T. 334.)

The law enforcement officers, the dentist and Ms. Heitmuller all testified that Respondent was in an extremely nervous and agitated state

during these events.[2] These witnesses also agreed that Respondent, though armed with a .357 pistol (i) never struck or touched anyone during the escape (Tr. T. 290-91 (Dep. King); 304 (Sgt. Campbell); 324 (Dr. Busch)) except when he took Carol Heitmuller's arm (Tr. T. 351), and (ii) never ver-

---

2. Deputy King recalled that "'[h]e was real -- I've never seen anybody that hyper in my life, to be really scared, you know, he wasn't calm in his actions at all" (Tr. T. 288, quoting the deputy's commitment hearing testimony). Sergeant Campbell observed that Respondent "appeared to be quite nervous" and that "his feet were shaking." (Tr. T. 303.) Dr. Busch agreed that Respondent was "extremely nervous" and "shaky * * * [a]ll over," that his voice "quivered" and that he seemed "frightened". (Tr. T. 322-24.) Carol Heitmuller, the dental assistant, testified that Respondent was "extremely nervous" (Tr. T. 332) and that she "had never seen anyone that nervous" (Tr. T. 350, quoting Ms. Heitmuller's commitment hearing testimony). She also described Respondent as "breathing very heavily, very rapidly." (Tr. T. 350.)

bally threatened anyone (Tr. T. 290 (Dep. King); 304 (Sgt. Campbell); 324 (Dr. Busch); 351 (Carol Heitmuller)).

Outside in the parking lot, Respondent located Dr. Busch's automobile but was unable to find the right key to open the car door. (Tr. T. 336.) He then called to Ms. Heitmuller, "'Come on, we're going up the hill.'" (Tr. T. 338.) He let go of her arm, and with the pistol pointed toward her, preceded her to the top of a small embankment behind the parking lot. Ms. Heitmuller then asked for permission to leave. (Tr. T. 352.) Respondent replied, "'Well, I'm not going to hurt you'" (Tr. T. 352), saying that he "just needed [her] * * * for protection" (Tr. T. 338).

The other prisoner left as Respondent and Ms. Heitmuller then ran

across an open clearing and approached John Dempsey, a resident standing in his driveway. Pistol in hand, Respondent called to Mr. Dempsey to give him a car. (Tr. T. 340, 356.) When Mr. Dempsey "told him I didn't have no car * * * they went on" without stopping. (Tr. T. 356.) Mr. Dempsey testified that Respondent appeared "nervous" and "frightened" (Tr. T. 361), but Respondent did not threaten or otherwise harm Mr. Dempsey (Tr. T. 352).

Respondent and Ms. Heitmuller soon came to a small frame house belonging to Claude Collie, a 72-year-old retired carpenter. (Tr. T. 368.) Respondent approached the front screen door of the home and "knocked hard" on the screen. When Mr. Collie opened the door, Respondent asked him for his car.

(Tr. T. 341.) Collie, who was "a very large man * * * over six feet tall and weigh[ing] over two hundred pounds," (Tr. T. 485), slammed the inner wooden door (Tr. 341). Respondent's .357 pistol -- which had been held against the screen door approximately 3 3/4 inches away from the inner door (Tr. T. 453, 514)[3] -- immediately discharged;[4] its

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3. According to Richard Earnest, the State's ballistics expert, an examination of the gunshot holes in the screen door revealed that "the muzzle of the gun * * * had to be very close, in close proximity, if not in complete contact with the screen to blow these characteristic type holes into this screen." (Tr. T. 518.)

4. Mr. Earnest, the State's ballistics expert, testified that if the hammer of the .357 pistol had been cocked, it would have discharged under three pounds of trigger pull. If the weapon had not been cocked, it would have required twelve pounds of pressure to discharge. Any weapon discharging under less than five pounds of trigger pressure, the expert explained, would be deemed to have a "light trigger". (Tr. T. 526.)

bullet travelled through the screen door, hit the wooden door frame of the inner door, began to tumble and struck Mr. Collie in the chest area (Tr. T. 453, 488, 490). A moment later, the weapon discharged a second bullet, which passed at a sharply different angle up through the screen door and the glass pane and curtain of the inner door, before entering the ceiling immediately inside the front door. (Tr. T. 429, 449, 519-20.)

Claude Collie fell to the floor, mortally wounded in his heart and lung by the first bullet. (Tr. T. 486-87.) His wife, Ollie Collie, heard him say "I been shot" as he fell; she quickly ran into an adjacent bedroom. (Tr. T. 375.) As the pistol discharged, Respondent let go of Carol Heitmuller. Ms. Heitmuller, who then believed that

the second shot had come from inside the house, quickly ran away. (Tr. T. 354.) Respondent, who also thought that someone had shot at him (Tr. T. 465), left the porch. He was standing in front of the yard when he saw Gladys Collie, Mr. Collie's grown daughter. (Tr. T. 367.) Respondent then turned back toward the Collie home, entered it and pointed his weapon at Gladys Collie. (Tr. T. 363.) She retreated to the kitchen and tried to shut the kitchen door; as Respondent opened it, she ran out the back door through a field to a neighbor's home. (Tr. T. 364.)

Respondent did not pursue Gladys Collie further. Instead, he approached Mrs. Ollie Collie, holding the gun towards her head. Mrs. Collie testified that in demanding her car keys,

Respondent stated, "Give me the keys * * * I just might as well kill you." (Tr. T. 376-77.) When Mrs. Collie did not comply with Respondent's demand, he did not restrain her from fleeing out the front door. (Tr. T. 376.)

Some moments later, a neighbor of the Collies, Liz Howard, having heard gunfire, looked outside and saw Respondent running down a hill through her yard. (Tr. T. 384.) Ms. Howard testified that Respondent "was sort of, you know, staggering from the left and right, just like he didn't know what was happening or what had happened, like he was shocked at what had happened" and that he "looked like he was in shock, like he didn't know what had happened." (Tr. T. 388, 390.)

Respondent managed to elude capture by the police during the rest of the daylight hours. (Tr. T. 466-67.) At about 8 p.m., he attempted to enter an occupied automobile, but he did not fire his gun when the occupants drove away. (Tr. T. 393.) Soon thereafter, the police closed in on a fenced area behind a shoe store toward which Respondent had fled. (Tr. T. 405.) Cobb County Police Detective Mike Barfield testified that as he approached, Respondent could be seen with both hands held high in the air, hysterically screaming several times, "'Please don't shoot me. I didn't mean to hurt nobody. I didn't mean to do it. Please don't kill me. Please don't shoot me.'" (Tr. T. 405, 409.) At the direction of the police, Respondent lay on his stomach and submitted

to arrest. (Tr. T. 405-06.) An arresting officer described Respondent as "very excited and trembling, like running wild." (Tr. T. 414.)

Within an hour of his capture, Respondent insisted -- against the advice of his two attorneys, who were present (Tr. T. 436-37, 470) -- on giving the police a full account of the day's events (Tr. T. 459-71). In his statement, Respondent acknowledged that he had planned to escape that morning if possible. (Tr. T. 462.) However, he earnestly maintained he did not deliberately shoot Claude Collie, stating:

> "[A]ll I needed was a car to get away and this old man came to the door and I told him, I said uh, I want your car keys and I just held the gun up and I said, I want your car keys and he slammed the door and the gun went off, I didn't mean to kill nobody. I didn't even know it hit him til [I

was] coming in." (Tr. T. 464.)

One of the interrogating officers, Lieutenant Lee Moss, testified that when "telling us about the actual gun going off, the actual firing of the shot, [Respondent's] voice began to get a little shaky, a little quivering. He did show some emotion at this point." (Tr. T. 474.) Respondent closed his statement by reiterating, "I didn't mean to kill nobody, the gun just, the gun went off but when he slammed the door and the gun went off, I wouldn't hurt nobody for nothing." (Tr. 470.)

Defense counsel asked Lieutenant Moss, the officer in charge of the Detective Bureau's Crimes Against Persons Unit (Tr. T. 427), whether he believed that Respondent's statement had been truthful. Having investigated the case thoroughly, ever since 10:00

a.m. on the day of the shooting (id.), and having observed the Respondent's demeanor while making his statement, Lieutenant Moss replied:

> "To the best of my knowledge, like I say, there are slight discrepancies but the basic story that he told, I believe is fairly true." (Tr. T. 472.)[5]

B. Respondent's Defense That He Did Not Intend To Kill Claude Collie

Respondent's principal defense to the malice murder charge was his contention that he never intended to kill Claude Collie. In his opening argument, defense counsel told the jury:

> "Raymond Franklin expects that the evidence will show that he did not go to Claude Collie's

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5. At the suppression hearing, Lieutenant Moss testified that after Respondent made his statement, Moss had told Respondent that Moss would testify "to his truthfulness, which in my opinion the statement depicts. * * *." (Tr. T. 444.)

house with the intention of killing anyone." (Tr. T. 273.)

Throughout the State's case, defense counsel sought to establish by cross-examination (i) that Respondent was extremely shaky and nervous on the day of the escape; (ii) that he was under the influence of drugs that day;[6]

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6. In his January 17, 1979 statement, Respondent informed the police officers that before going to the dentist that day, he had taken at least five drug capsules which had been prescribed and given to him while in jail (Tr. T. 461), and that as a result, he was "very high," not only when he escaped with Carol Heitmuller (Tr. T. 463), but also later, after the shooting (Tr. T. 466). Cobb County Jail physician Dr. William Tryon confirmed that he had prescribed two daily doses of Darvon 65 and Tranxene for Respondent in the week prior to Respondent's escape. (Tr. T. 798-99.) The Chief Medical Examiner, Dr. Joseph Burton, testified that among the reported patient reactions to Tranxene use are "nervousness, blurred vision, headache and mental confusion" (Tr. T. 495), and that Darvon can cause "confusion, anxiety and tremors" when
(footnote continued)

(iii) that he did not harm anyone else that day who refused to provide him with a car, including Mr. Dempsey and Mrs. Ollie Collie, and (iv) that Claude Collie was killed either when the "light trigger" .357 pistol Respondent was wielding accidentally discharged after Mr. Collie slammed his front door, jarring the weapon, or alternatively, when Respondent nervously pulled the trigger in response to Mr. Collie's sudden action, without any intention of aiming at or of hitting Mr. Collie. At the close of the guilt-determination phase of Respondent's trial, defense counsel

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(footnote continued from previous page)
taken with other drugs (id.). The Medical Examiner also testified that when such drugs are taken together, they can have a "synergistic effect," (Tr. T. 496), and might therefore affect a user's judgment and perception and cause hypersensitivity to sound or movement (Tr. T. 497).

argued to the jury that Respondent "did not go to Claude Collie's house to kill him" and that when Mr. Collie slammed the door in Respondent's face, the gun went off accidentally. (Tr. T. 552.)

C. The Charge To The Jury

The entire charge to the jury has been reprinted at pages 3a-15a of the Joint Appendix. The charge included the following instructions relating to the crucial question of whether Respondent intended to kill Claude Collie or whether, instead, the killing was an unintended accident:

> "A crime is a violation of a statute of this State in which there shall be a union of [sic] joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The

> acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." (Tr. T. 656; Joint Appendix 8a-9a.)
>
> * * * *
>
> "As to Count II, I charge you that the law of Georgia defines murder as follows: A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where

all the circumstances of the killing show an abandoned and malignant heart.

"Now, you will see that malice is an essential ingredient in murder as charged in this indictment in Count II, and it must exist before the alleged homicide can be murder. Malice in its legal sense is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing." (Tr. T. 657-58; Joint Appendix 10a.)

* * * *

"Now, as to each count of this indictment, the defendant contends that he is not guilty of the offense charged and further contends that the State has not proved his guilt of the offenses as charged in each count to a reasonable and moral certainty and beyond a reasonable doubt, and he further contends as to Count II, the murder, that the homicide was an accident.

"I charge you that a person shall not be found guilty of any crime committed by misfortune or accident

> where it satisfactorily appears there was no criminal scheme or undertaking or intention of [sic] criminal negligence. An accident, in the eyes of the criminal law, is an event that takes place without one's foresight or expectation; that which takes place or begins to exist without design." (Tr. T. 659; Joint Appendix 11a.)

Over an hour after the jury had retired (Tr. T. 661), it returned to the courtroom with the following message: "We need a definition of malice & forethought" [sic]. (Tr. T. 662, 821-a.) The jury's foreman also requested "a definition of what they legally term accidental." (Tr. T. 662; Joint Appendix 13a-14a.) The court then repeated its charges on accident and malice. (Tr. T. 662; Joint Appendix 14a.) After ten minutes of additional deliberation, the jury returned with a verdict finding Respondent guilty. (Tr. T. 663-64.)

D. The Eleventh Circuit's Holding

The United States Court of Appeals for the Eleventh Circuit agreed with Respondent's contention that there was "a Sandstrom violation in the intent instruction as a matter of law" and held that the writ of habeas corpus must therefore issue. Accordingly, the Eleventh Circuit found it unnecessary to address Respondent's several other claims. Franklin v. Francis, 720 F.2d 1206, 1208 (11th Cir. 1983), rehearing denied, 723 F.2d 770 (11th Cir.) (per curiam), cert. granted, 104 S. Ct. 2677 (1984).

SUMMARY OF ARGUMENT

Respondent's principal defense to the charge of malice murder was that he did not intend to kill the victim. The defense, which was supported by numerous facts in the record, was that the decedent died either because Respondent's pistol discharged accidentally when the decedent unexpectedly slammed his front door or because Respondent nervously pulled the trigger in response to the sudden door-slamming.

In its instructions at the close of the guilt-determination phase, the trial court charged Respondent's jury that a person "is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted" and that a person's acts "are presumed to be the product of the per-

son's will, but the presumption may be rebutted." (Tr. T. 656; Joint Appendix 8a-9a.) Since nothing in the charge as a whole indicated the quantum of proof that would be necessary to rebut these presumptions, a reasonable juror could have construed the charge as requiring the Respondent to rebut the presumptions by considerably more than "some evidence." Hence, the jury charge was unconstitutional under Sandstrom v. Montana, 442 U.S. 510 (1979), in that it effectively shifted the burden of persuasion regarding Respondent's intent to kill.

Petitioner repeatedly points out that the presumptions here were rebuttable, but the Sandstrom holding makes it clear that the rebuttability of a presumption does not make the presumption constitutional. Petitioner also

points to several other portions of the charge. However, none of them prevented the charge as a whole from being unconstitutional, because none of them indicated what nature of rebuttal was required to defeat the presumptions. Moreover, the charge's thrice-repeated instruction that it must "satisfactorily" appear that there was no intent in order for the jury to conclude that the killing was an accident (Tr. T. 656, 659, 662; Joint Appendix 8a, 11a, 14a) actually increased the likelihood that a reasonable juror would believe that Respondent had the burden of persuasion regarding his intent to kill.

Since the unconstitutional charge here related to the overriding factual issue in the case, which was highly disputed, the error was not harmless under either view of Chapman

v. California, 386 U.S. 18, 22-24 (1967), enunciated in Connecticut v. Johnson, 460 U.S. 73 (1983). The Johnson plurality's view that Sandstrom error can only be harmless when intent (i) is not at issue, (ii) has been conceded, or (iii) has no bearing on the offense in question, id. at 87, is consistent with this Court's past consideration of constitutional errors affecting the very core of the truth-finding function. But even if the approach of Johnson's dissent is followed, the error here was clearly not harmless, because the evidence was not "so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Id., 460 U.S. at 97 n. 5 (Powell, J., dissenting) (citation

omitted). The Johnson dissent's test cannot be met because:

> "[T]he events adduced at trial showed clearly that Franklin fired the shot that went through the door and killed Claude Collie. The evidence also showed that the shot coincided with Collie's slamming the door in Franklin's face. Franklin was said to have been quite nervous. Though he had the opportunity to injure others he did not. The only substantial question put to the jury was Franklin's intent. The presumptions contained in the instructions on intent were thus extremely important to the outcome of the trial. * * *" Franklin v. Francis, supra, 723 F.2d at 772.

ARGUMENT

I.

THE JURY CHARGE WAS UNCONSTITUTIONAL BECAUSE A REASONABLE JUROR COULD HAVE INTERPRETED IT AS EFFECTIVELY SHIFTING THE BURDEN OF PERSUASION REGARDING RESPONDENT'S INTENT TO KILL

A. It Is Unconstitutional To Shift The Burden Of Persuasion Regarding Any Element Of A Crime Through The Use Of A Rebuttable Presumption

The Fourteenth Amendment to the United States Constitution requires as a matter of due process that the State prove the existence of every element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Hence, a jury charge which shifts the burden of persuasion with respect to any element of a criminal offense violates a criminal defendant's Fourteenth Amendment rights. Mullaney v. Wilbur, 421 U.S. 684, 701, 703-04 (1975). As this Court has repeatedly recognized, this constitutional principle applies to the use of presumptions in jury charges:

> "Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." Patterson v. New York, 432 U.S. 197, 215 (1977).

Indeed, in Sandstrom v. Montana, 442 U.S. 510, 517, 521 (1979), this Court specifically held that a jury charge which could reasonably have been construed as setting forth a rebuttable presumption that the defendant intended the ordinary consequences of his acts was unconstitutional. This Court held that where a presumption is rebuttable, the constitutional problem arises because:

> "[T]he jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their

'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence -- thus effectively shifting the burden of persuasion on the element of intent." Id. at 517 (emphasis in original).[7]

B. The Jury Charge In Respondent's Case Set Forth Rebuttable Presumptions With Respect To A Critical Element Of The Crime: Respondent's Intent To Kill

Respondent was accused of malice murder. Under Georgia law, intent to kill is a necessary element of malice murder. Johnson v. State, 249 Ga. 621, 622, 292 S.E.2d 696, 698 (1982); Lamb v. Jernigan, 683 F.2d 1332, 1336-37

7. The unconstitutional jury charge in Mullaney v. Wilbur, 421 U.S. 684 (1975), also involved a rebuttable presumption. The Mullaney jury was instructed that it had to imply an element of the crime, malice aforethought, unless the defendant rebutted that implication by demonstrating through a fair preponderance of the evidence that he had acted in the heat of passion on sudden provocation. Id. at 686.

(11th Cir. 1982), cert. denied, 103 S. Ct. 1276 (1983); Mason v. Balkcom, 669 F.2d 222, 224 (5th Cir. Unit B 1982), cert. denied, 460 U.S. 1016 (1983). At Respondent's trial, intent to kill was the principal matter at issue. As set forth in detail above (see pages 4-18, supra), Respondent's attorney elicited substantial evidence and argued vigorously to the jury that Respondent had no intention of killing, or even shooting at, Mr. Collie.

However, the jury was charged that:

"The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." (Tr. T. 656; Joint Appendix 8a-9a.)

This instruction clearly set forth rebuttable presumptions relating to Respondent's intent to kill, the crucial issue in the case. Accordingly, as in Sandstrom v. Montana, 442 U.S. 510, 520-21 (1979):

> "[T]he question before this Court is whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of [Respondent's] state of mind."

C. The Charge Here Was Unconstitutional Because A Reasonable Juror Could Have Construed It As Requiring The Respondent To Rebut The Presumptions Through Considerably More Than "Some" Evidence

1. This Court Must Determine How A Reasonable Juror Could Have Interpreted the Instruction

Whether or not the challenged jury instruction was unconstitutional "depends upon the way in which a rea-

sonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979). If a reasonable juror could have given the presumption a persuasion-shifting effect, such as by requiring the Respondent to prove his lack of intent to kill "by some quantum of proof which may well have been considerably greater than 'some' evidence," id. at 517, the instruction was unconstitutional. Id. at 524.

2. In Making This Determination, It Is Prudent To Examine First The Challenged Instruction Itself

Before finally determining that the challenged instruction could, indeed, have been interpreted as effectively shifting the burden of persuasion regarding Respondent's intent to kill, the Court must consider that instruction in the context of the

charge as a whole. Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). However, it is obviously prudent to review the challenged instruction itself first, because that review may make it apparent that there is no possible constitutional problem. Thus, as in Cupp v. Naughten itself, an initial look at the challenged instruction may obviate an examination of the remainder of the charge. Id. at 148-49. In other cases, such as Sandstrom, the initial review reveals a serious possibility that the challenged instruction may have had an unconstitutional effect. In such cases, it is necessary to consider the challenged language in the context of the charge as a whole, to determine whether the potential unconstitutional interpretations of the presumption were "removed by the other

instructions given at the trial." Sandstrom v. Montana, 442 U.S. 510, 518 n. 7 (1979).

The Eleventh Circuit reviewed the challenged instruction here in precisely the same manner that this Court reviewed the challenged instructions in Cupp, supra, and Sandstrom, supra. The Eleventh Circuit looked first at the challenged language itself. Finding that the challenged instruction might be construed in an unconstitutional burden-shifting way, Franklin v. Francis, supra, 720 F.2d at 1209-11; 723 F.2d at 770-71, the Eleventh Circuit went on to consider in extraordinary detail all other portions of the charge. The Eleventh Circuit carefully considered whether any other portion(s) of the charge, when read together with the challenged language, eliminated the

possibility that a reasonable juror could have interpreted the charge as shifting the burden of persuasion regarding Respondent's intent to kill. Franklin v. Francis, supra, 720 F.2d at 1211-12; 723 F.2d at 771-72. Hence, there is no basis for Petitioner's attack on the Eleventh Circuit's mode of analysis (Pet. Br. 17-20).[8]

3. Examination Of The Challenged Instruction Here Reveals A Grave Danger That The Charge Was Construed As Shifting The Burden Of Persuasion Regarding Respondent's Intent To Kill

Upon first examining the challenged instruction and then looking at the charge as a whole to determine whether the jury was ever "enlightened" regarding the nature of the presumption, the Eleventh Circuit concluded:

> "The presumption on intent in this case allowed the same result

8. References to "Pet. Br. ____" are to the pages in the Brief For Petitioner, dated July 30, 1984.

as did the presumption in Sandstrom. A reasonable jury could have understood the instruction to mean that the burden to prove 'no intent to kill' shifted to the defendant once the State showed sound mind, the act of pointing the gun at Mr. Collie, and pulling the trigger, of which the natural and probable consequence was Mr. Collie's death.

> "The problem with the charge on intent here is that the jury was never enlightened as to the nature of the burden on Franklin to rebut the presumption that he intended the killing. If the jury was persuaded that Franklin had to produce more than some evidence that he did not intend to kill, the burden shifted impermissibly on an element essential for a malice murder verdict." Id., 720 F.2d at 1211.

Respondent submits that the Eleventh Circuit's conclusion is manifestly correct. The jury was instructed that Respondent's acts "are presumed" to be the product of his will and that he "is presumed to intend the natural and probable consequences of his acts," and that both presumptions

"may be rebutted." (Tr. T. 656; Joint Appendix 8a-9a.) There were no ifs, ands, buts, or maybes regarding whether these presumptions were to be applied in the absence of sufficient rebuttal. Thus, these presumptions plainly called for a finding of intent to kill unless they were sufficiently rebutted. Yet, one can look from one end of the charge to the other without finding any instruction regarding how much rebuttal of these presumptions was necessary.

Accordingly, the rebuttable intent presumption here presented the same grave danger that the second possible interpretation of the presumption in Sandstrom was held to present:

> "[T]he jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence -- thus effectively shifting the burden of persuasion on the element of intent." Sandstrom v. Montana, 442 U.S. 510, 517 (1979) (emphasis in original).

This Court specifically held in Sandstrom that under the foregoing possible interpretation, in which the instruction was construed as creating a rebuttable presumption, the charge was unconstitutional. Id. at 521, 524. Hence, Petitioner is flatly incorrect in his repeated attempts to distinguish this case from Sandstrom on the ground that the presumption here was rebuttable (Pet. Br. 10, 13-14, 15, 16, 19, 20).

4. When The Charge As A Whole Is Considered, It Is Apparent That The Danger Of An Unconstitutional Interpretation Was Actually Intensified, Not Eliminated

Petitioner has pointed to various other aspects of the charge which

he claims eliminated any potential for an unconstitutional interpretation of the charge as a whole. As demonstrated below, those portions of the charge do not eliminate the danger of an unconstitutional interpretation, and other instructions actually increased the risk that the jury would construe the charge as a whole as effectively shifting the burden of persuasion regarding Respondent's intent to kill Mr. Collie.

a. The Charge That Criminal Intent Would Not Be Presumed

Petitioner maintains (Pet. Br. 14, 15, 16, 19) that the challenged rebuttable presumption was not unconstitutional because the charge immediately went on to say that criminal intent would not be presumed but could be found based on the defendant's overt acts and the surrounding circumstances. (Tr. T. 656; Joint Appendix 9a.) In

evaluating Petitioner's contention, it is important to consider which element of the malice murder charge was affected by the criminal intent charge.

If the jury construed the "criminal intent" instruction as referring to Respondent's intent to kill Mr. Collie, then, as the Eleventh Circuit held, the criminal intent instruction "at best conflicted with the challenged presumption; it did not explain it." Franklin v. Francis, supra, 720 F.2d at 1212. The jury was first instructed that if the Respondent is of sound mind and discretion, his acts "are presumed," rebuttably, to be the product of his will and that he "is presumed [rebuttably] to intend the natural and probable consequences of his acts" -- under circumstances where a natural and probable consequence of Respondent's

acts was Mr. Collie's death. (Tr. T. 656; Joint Appendix 8a-9a.) If the immediately following instruction on criminal intent was construed as meaning that intent to kill "will not be presumed," then there would be a direct conflict within a single paragraph of the charge. The jury, under that construction, was charged in rapid succession both that there is a presumption of intent and that there will not be a presumption of intent.

In the face of that inconsistency, there would be no way of knowing "which one they decided to apply, or whether they applied something in between," so the charge must be held unconstitutional. Franklin v. Francis, supra, 720 F.2d at 1212. Accord, Mills v. United States, 164 U.S. 644, 649 (1897); Bollenbach v. United States,

326 U.S. 607, 613-14 (1946); Smith v. Smith, 454 F.2d 572, 578 (5th Cir. 1971), cert. denied, 409 U.S. 885 (1972); Rogers v. Redman, 457 F. Supp. 929, 932-33 (D.Del. 1978). As this Court reiterated in Sandstrom:

> "'[I]t has long been settled that when a case has been submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, e.g., Stromberg v. California, 283 U.S. 359 (1931).' Leary v. United States, 395 U.S., at 31-32." Sandstrom v. Montana, 442 U.S. 510, 526 (1979) (citations omitted).

In any event, there is an alternative way of construing the instruction on criminal intent such that it "is not rhetorically inconsistent with" the immediately-preceding presumptions. See Sandstrom, supra, 442 U.S. at 518-19 n. 7. In view of the charge's later instructions that "malice is an essen-

tial ingredient in murder as charged" and that malice "is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse" (Tr. T. 658, Joint Appendix 10a) (emphasis supplied), the jury could have concluded, correctly, that under Georgia law intent to kill does not suffice to establish criminal intent. To satisfy the criminal intent, or malice, element, the jury must also find beyond a reasonable doubt that the killing was unlawful, i.e., without justification, mitigation or excuse.[9]

Thus, as the Eleventh Circuit held:

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9. This potential interpretation by the jury is in full accordance with Georgia law. See Patterson v. State, 239 Ga. 409, 416-17, 238 S.E.2d 2, 8 (1977); Lamb v. Jernigan, 683 F.2d 1332, 1337 (11th Cir. 1982), cert. denied, 103 S.Ct. 1276 (1983).

> "At worst, the jury could have made the instructions consistent, interpreting the burden to be on the defendant to rebut the presumption that he intended to kill Mr. Collie, and on the State to show that the killing itself was criminal." Franklin v. Francis, supra, 720 F.2d at 1212.

Under this interpretation, the State had the assistance of the unconstitutional presumption in proving the necessary element of intent to kill -- although not in also proving that the killing was without mitigation, justification or excuse. Since the criminal intent instruction did not prevent the challenged presumption from being "a means by which proof beyond a reasonable doubt as to intent could be satisfied," the jury charge was unconstitutional. Sandstrom v. Montana, 442 U.S. 510, 518-19 n. 7 (1979).

b. The Instructions On Accident

Other instructions in the charge, viz., those concerning accident, actually intensified the danger that the jury would construe the challenged presumption instruction as having effectively shifted to the Respondent the burden of persuasion regarding the intent to kill.[10] The jury was charged three times that:

> "A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence." (Tr. T. 656, 659, 662; Joint Appendix 8a, 11a, 14a.)

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10. In reinforcing the danger of an unconstitutional interpretation of the challenged instruction, the instructions on accident here were akin to portions of the charges in Phillips v. Rose, 690 F.2d 79, 81 (6th Cir. 1982) and Callahan v. LeFevre, 605 F.2d 70, 74-75 (2d Cir. 1979).

This instruction was first given immediately before the challenged presumption instruction. (Tr. T. 656; Joint Appendix 8a.) It was repeated near the end of the charge, where it was preceded by the statement that the Respondent "contends as to Count II, the murder, that the homicide was an accident." (Tr. T. 659; Joint Appendix 11a.) And it was given again near the end of the jury's deliberation, when the jury requested "a definition of what they legally term accidental." (Tr. T. 662; Joint Appendix 14a.)

A reasonable juror could have construed this thrice-repeated instruction as reinforcing the burden-shifting effect of the rebuttable presumption, by requiring the Respondent to satisfy the jury that the killing was not intentional. The accident instruction

was easily susceptible of that interpretation, since the only party having any interest in persuading the jury that it "satisfactorily appears there was no * * * intention" was the Respondent.[11] Indeed, the trial court's prefatory statement that accident was the Respondent's contention (Tr. T. 659;

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11. As revealed by the very words of the accident charge, a showing that an accident had occurred would necessarily have negated the existence of intent to kill, an element of the crime. Indeed, the concept that accident negates intent to kill has been recognized in other states. See, e.g. State v. Poole, 33 Ohio St.2d 18, 20, 294 N.E.2d 888, 890 (1973); State v. Ferguson, 91 S.C. 235, 244, 74 S.E. 502, 505 (1912). Since the accident charge here was susceptible of being construed as placing on the defendant the burden of persuasion regarding a defense whose existence negatives an essential element of the crime, the charge as a whole was unconstitutional. See Patterson v. New York, 432 U.S. 197, 206-07 (1977); Mullaney v. Wilbur, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring).

Joint Appendix 11a) served to emphasize the Respondent's motivation in that regard. Accordingly, a reasonable juror, having repeatedly heard the accident charge, may well have been reinforced in the belief that the Respondent effectively bore the burden of persuasion regarding his intent to kill.[12] Cf. Hankerson v. North Carolina, 432 U.S. 233, 238 (1977) (referring to the North Carolina Supreme Court's holding "that a burden

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12. While until 1976, Georgia defendants bore the burden of persuasion regarding the accident defense, Chandle v. State, 230 Ga. 574, 198 S.E. 2d 289 (1973), in 1976 the Georgia Supreme Court barred the Georgia courts from shifting the burden of persuasion with respect to any affirmative defense. State v. Moore, 237 Ga. 269, 270-71, 227 S.E. 2d 241, 242 (1976). Yet, in Respondent's 1979 trial, the judge continued to use the statutory definition of accident. That definition had not been amended since 1976, and thus reflected Georgia's prior burden-shifting policy.

to 'satisfy' the jurors of a fact is not 'significantly less' than a burden to persuade them of the fact by a preponderance of the evidence.")

Indeed, the likelihood that the accident charge aggravated the burden-shifting effect of the intent presumptions was increased by its repetition. This misleading instruction was repeated for the third time during the jury's deliberation (when the jury specifically asked for a definition of accident), particularly magnifying the possibility of burden-shifting.[13]

c. Other Aspects Of The Charge As a Whole

The other portions of the charge to which Petitioner refers (Pet. Br.

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13. See Bollenbach v. United States, 326 U.S. 607, 612-13 (1946) ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.").

14-15) do not eliminate the possibility that a reasonable juror could have construed the charge as a whole as shifting the burden of persuasion regarding Respondent's intent to kill. Standard charges regarding the burden of proof and the presumption of innocence were also present in Sandstrom. Here, as in Sandstrom, those charges did not remove the potential for unconstitutional interpretation, since the jury could have construed the charge "as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." Sandstrom v. Montana, 442 U.S. 510, 518-19 n.7 (1979). For the same reason, the introductory instruction that, unlike the State, the defendant had no burden to prove anything (Tr. T. 656; Joint Appendix 8a) did not

eliminate the potential for unconstitutional interpretation. Id.; accord, United States v. Booz, 451 F.2d 719, 723-24 (3d Cir. 1971), cert. denied, 414 U.S. 820 (1973) (potential for confusion regarding the burden of persuasion, arising from inadequate charge regarding alibi defense, was not eliminated by general charge that the burden of proof never shifts from the government).

In defining a crime as requiring both an act "and intention or criminal negligence" (Tr. T. 656; Joint Appendix 8a), the charge not only did not remove the potential for an unconstitutional interpretation, Sandstrom, supra, 442 U.S. at 518-19 n.7; it increased the likelihood of an unconstitutional interpretation, by suggesting (as did the accident charge) that either intent

to kill or criminal negligence was an element of malice murder.[14] Finally, the instruction that the accused need not "produce evidence of mitigation, justification or excuse" (Tr. T. 658; Joint Appendix 10a) also failed to eliminate the potential for an unconstitutional interpretation. As the Eleventh Circuit held, that instruction:

> "referred to the malice part of the charge. Franklin argued that he did not intend to kill Claude Collie. The damaging presumption, that a person is presumed to intend the natural and probable consequences of his acts, was not mitigated by the correct malice charge." Franklin v. Francis, supra, 723 F.2d at 772 (emphasis supplied).

While Petitioner, without any discussion, asserts that three other

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14. As discussed at pages 30-31, supra, intent to kill is an essential element of malice murder under Georgia law.

Eleventh Circuit decisions demonstrate that the Eleventh Circuit did not properly evaluate the charge as a whole here (Pet. Br. 18-19), even a cursory review of those cases reveals that their differing outcomes were due to the different natures of the various charges. Thus, in Corn v. Zant, 708 F.2d 549 (11th Cir. 1983), cert. denied, 104 S. Ct. 2670 (1984), the charge specifically indicated that the defendant was not required to show circumstances negating either intent or malice and that the malice presumption did not arise until intent was proven beyond a reasonable doubt. Franklin v. Francis, supra, 723 F.2d at 771-72 (per curiam decision joined in by Judge Hill, who had previously joined in the Corn decision). In Hance v. Zant, 696 F.2d 940, 953 (11th Cir.), cert.

denied, 103 S. Ct. 3544 (1983), and in Lamb v. Jernigan, 683 F.2d 1332, 1339-40 (11th Cir. 1982), cert. denied, 103 S. Ct. 1276 (1983), the charges that intent "may be inferred" or "may be presumed" were patently permissive.[15] Franklin v. Francis, supra, 723 F.2d at 770-71. Accordingly, insofar as the consistency of the Eleventh Circuit's other decisions could possibly be relevant to this Court's determination, this Court should have renewed confidence in the Eleventh Circuit's ability to distinguish the charge as a whole in this case from the charges as a whole in other cases.[16]

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15. Elsewhere in Lamb, a true rebuttable presumption was held to be unconstitutional. Id. at 1341.

16. The Petitioner also cites the Georgia Supreme Court's decisions in this case and in Skrine v. State, 244 Ga. 520, 260 S.E.2d 900 (1979). In both cases, the (footnote continued)

Petitioner also relies upon (Pet. Br. 21-22) the dissenting opinion of a visiting senior judge in Patterson v. Austin, 728 F.2d 1389, 1396-98 (11th Cir. 1984) (Gibson, J., dissenting). Judge Gibson was unwilling to hold a charge unconstitutional because he doubted that a reasonable juror could distinguish between a mandatory presumption and a permissive inference. Id. at 1397. But that view merely reveals Judge Gibson's apparent disagreement with Sandstrom itself. The Sandstrom holding was premised on the

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(footnote continued from previous page) Georgia Supreme Court relied heavily on the rebuttability of the presumptions -- a factor which, as discussed at pages 29-30, 38-39, supra, does not make a charge constitutional. As this Court recognized in Sandstrom, supra, a state supreme court "is not the final authority on the interpretation which a jury could have given the instruction." 442 U.S. at 516-17.

danger that the jury might construe an ambiguous charge unconstitutionally, even though a constitutional interpretation was also possible. This Court held:

> "We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that the defendant come forward with 'some' evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid." Sandstrom v. Montana, 442 U.S. 510, 519

(1979) (citations and footnote omitted).[17]

17. Moreover, Judge Gibson would disagree with the Eleventh Circuit's decisions in this case only to the extent that they could be construed as viewing the rebuttability of the presumptions and the criminal intent instruction as "wholly irrelevant" in a consideration of the charge as a whole. 728 F.2d at 1397. The Eleventh Circuit's decisions in Franklin hardly deemed those aspects of the charge irrelevant. The Eleventh Circuit considered those portions of the charge in depth. Indeed, it particularly stressed the fact that in the present case (unlike Patterson), the crucial disputed issue was intent to kill, not malice. Franklin v. Francis, supra, 720 F.2d at 1212; 723 F.2d at 772.

In any event, Judge Gibson's ultimate view of the holding in the instant case is far from clear. His dissent states that the Patterson charge as a whole was more akin to the charges found constitutional in Corn, supra, and Lamb, supra, than to the Franklin charge. 728 F.2d at 1397. Judge Gibson also refers to other instructions in Patterson's charge which were not present in the Franklin charge, viz., that intent "may be inferred" or "may be presumed." Id. And he stresses that the correct criminal intent

(footnote continued)

II.

THE UNCONSTITUTIONALITY OF THE JURY CHARGE CANNOT PROPERLY BE DEEMED HARMLESS ERROR BEYOND A REASONABLE DOUBT, BECAUSE IT MAY HAVE DISTORTED THE JURY'S CONSIDERATION OF THE CRUCIAL, HIGHLY-DISPUTED ISSUE IN THE CASE

As demonstrated above, the charge in this case was unconstitutional, because a reasonable juror could have construed it as shifting the burden of persuasion regarding Respondent's intent to kill, which is an essential element of malice murder. The remaining issue is whether this

(footnote continued from previous page) instruction in Patterson related to the defendant's primary defense -- his lack of malice -- and was repeated at the end of the instruction. Id. Here, in contrast: (i) Respondent's primary defense was his lack of intent to kill and (ii) the charge which was repeated at crucial moments was the misleading charge on accident, which increased the likelihood of an unconstitutional shift of the burden of persuasion regarding the crucial intent-to-kill issue.

constitutional error was harmless beyond a reasonable doubt, under the standard set forth in Chapman v. California, 386 U.S. 18, 22-24 (1967). Respondent submits that a Sandstrom error can never be harmless when intent to kill is a disputed element of the alleged crime. But even if that view is not accepted and the Court applies instead the test enunciated by the dissent in Connecticut v. Johnson, 460 U.S. 73, 97-99 (1983) (Powell, J., dissenting), the Sandstrom error here cannot properly be deemed harmless beyond a reasonable doubt, because the error may have distorted the jury's consideration of the most crucial, highly-disputed issue in this case.

A. Sandstrom Error Can Never Be Harmless Where Intent To Kill Is A Disputed Element Of The Alleged Crime

In Chapman v. California, 386 U.S. 18 (1967), this Court recognized that the violation of constitutional rights which are "basic to a fair trial" can "never be treated as harmless error," id. at 23 (footnote omitted), but that harmless error analysis may be used with respect to "unimportant and insignificant" constitutional violations, id. at 22. Where the constitutional error directly relates to the truth-finding function of a trial, the very core of a fair trial has been affected. Thus, under the Chapman standard, such an error can never be harmless.

When the constitutional error shifts the burden of persuasion on an essential element of the alleged

offense, and when the facts regarding that element are in controversy, the centerpiece of the truth-finding function -- the jury -- is prevented from functioning properly. In that situation, the unconstitutional charge prevents the jury from deciding the case in a proper manner, thereby sabotaging the trial's truth-finding function. Hence, an unconstitutional burden-shifting instruction relating to a contested element of the alleged crime can never be a harmless error.

The foregoing conclusion is consistent with this Court's decisions in cases in which the factfinder has applied an unconstitutional legal standard. This Court has consistently recognized that such unconstitutionality severely distorts the truth-finding function. Thus, in Ivan V. v. City of

New York, 407 U.S. 203, 205 (1972) (per curiam), in which the finder of fact used an unconstitutional preponderance-of-the-evidence standard, this Court recognized that:

> "[T]he major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function * * *."

In Hankerson v. North Carolina, 432 U.S. 233, 242 (1977), where (as here) the jury was instructed to apply an unconstitutional burden-shifting presumption, this Court emphasized that:

> "In Mullaney v. Wilbur, as in In re Winship, the Court held that due process requires the States in some circumstances to apply the reasonable-doubt standard of proof rather than some lesser standard under which an accused would more easily lose his liberty. In Mullaney, as in Winship, the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect

of a criminal trial that 'substantially impairs the truth-finding function.'"

Where the truth-finding function has been substantially impaired, such as through the use of a burden-shifting presumption bearing on a controverted fact issue, the constitutional error may well have caused the jury to engage in a different kind of review of the facts and therefore to have reached a different conclusion than if it had been charged properly. In view of that possibility, a harmless error holding would be inconsistent with "the place of importance that trial by jury has in our Bill of Rights," because such a holding could only be based on a substitution of:

> "the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumber-

> some that process may be." Bollenbach v. United States, 326 U.S. 607, 615 (1946).

Indeed, "[n]o matter how strong the evidence may be" with respect to the controverted issue:

> "There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions * * *. A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction." United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 408-09 (1947).[18]

Hence, there is strong justification for the view of the plurality in Connecticut v. Johnson, 460 U.S. 73, 87 (1983), that a Sandstrom error can never properly be deemed to have been harmless where intent (i) was at issue,

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18. As the quotation from Sandstrom on pages 57-58, supra, indicates, there is no way to know whether a Sandstrom error affected the jury's deliberations. 442 U.S. at 519.

(ii) was not admitted and (iii) had a bearing on the offense for which the defendant was convicted. Accord, In re Hamilton, 721 F.2d 1189, 1191 (9th Cir. 1983).[19]

In Respondent's case, the constitutional error was not harmless under the Johnson plurality's view, because intent to kill certainly was at issue, was not admitted, and had a

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19. It is also more efficient to apply an automatic rule that comes into play whenever the facts regarding the particular element of the crime were at all at issue than to have this and other courts engage in their own reviews of the strengths and weaknesses of the evidence as a whole. In Connecticut v. Johnson, the dissenting justices were concerned that there might "be facts and circumstances not apparent from the record before us," and hence would have remanded the case to the Connecticut Supreme Court. 460 U.S. at 102 (Powell, J., dissenting). Yet, that would inefficiently have added still another layer of judicial review of the evidence.

bearing on malice murder, the offense for which Respondent was convicted. As discussed at pages 15-18, supra, Respondent's intent to kill was the principal matter at issue.

B. Even If A Sandstrom Error Can Sometimes Be Harmless When Intent To Kill Is Disputed, It Was Not Harmless Error Here, Where Intent to Kill Was the Most Critical Issue In the Case

Respondent submits that even under the standard articulated by the dissent in Connecticut v. Johnson, supra, the Sandstrom error here was not harmless beyond a reasonable doubt. The evidence here simply was not:

> "so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Id., 460 U.S. at 97 n.5 (Powell, J., dissenting) (citation omitted).

The Johnson dissent's standard cannot be met where, as here:

> "The presumptions contained in the instructions on intent were * * * extremely important to the outcome of the trial." Franklin v. Francis, supra, 723 F.2d at 772.

Accord, Dietz v. Solem, 640 F.2d 126, 131 (8th Cir. 1981).

The Eleventh Circuit's conclusion that the error here was not harmless is obviously correct, in view of the numerous facts, summarized at pages 2-18, supra, on the basis of which properly-charged jurors could have had a reasonable doubt regarding Respondent's intent to kill.[20] Among these facts are the following:

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20. Petitioner's brief asserts that the defense case was "patently frivolous" (Pet. Br. 27). But Petitioner cannot explain why, if that was so, the jury found it necessary to interrupt its deliberations in order to hear instructions on malice aforethought and accident. (Tr. T. 662; Joint Appendix 13a-14a.)

Respondent, although armed, never struck anyone during his escape (Tr. T. 290-91, 304, 324), never verbally threatened anyone as he made his escape from the dentist's office (Tr. T. 290, 304, 324, 351), told Ms. Heitmuller (the dental assistant) that he was not going to hurt her (Tr. T. 352), and went on without stopping when one resident said he did not have a car (Tr. T. 356) -- all just before Respondent went to the Collie home. When Mr. Collie suddenly slammed the inner front door, the pistol -- which had been held against the front screen door -- discharged once, hitting the wooden door, tumbling, and then fatally striking Mr. Collie. When it discharged again a moment later, both Respondent and Ms. Heitmuller believed that that shot came from inside the house. (Tr. T. 354,

465.) That shot travelled at a different angle and lodged in the ceiling. (Tr. T. 341, 429, 449, 453, 488, 490, 518-20.) Then, after Mrs. Collie refused his demand for car keys, Respondent did not restrain her from fleeing the house out the front door. (Tr. T. 375-76.) Immediately thereafter, Respondent, who had been extremely nervous and shaky that morning (Tr. T. 288, 303, 322-23, 332, 350), "looked like he was in shock, like he didn't know what had happened" (Tr. T. 390). Respondent repeatedly stated to the police that he did not intentionally shoot Mr. Collie (Tr. T. 405, 464, 470), and Lieutenant Moss, the principal investigating police officer, testified that he believed Respondent's account to be truthful except for some minor discrepancies (Tr. T. 472).

Any fairminded observer would have to recognize that the evidence of intent to kill here was tremendously weaker than in the situations described by the dissenters in Connecticut v. Johnson, 460 U.S. 73, 98-99 & n. 7 (1983) (Powell, J., dissenting) (Harmless error in the following situations: an execution-style slaying; repeated stabbings by a gang which also slit the victim's throat; shots in the head, preceded by beating the victim, wrapping a wire around the victim's neck and stuffing a towel in his mouth; and strangling the victim until informed that her pulse had ceased). Hence, even if there are cases in which "no rational person could doubt intent to murder," id. n. 7, Respondent's case is surely not one of them.

Conclusion

For all the reasons set forth above, Respondent respectfully requests that this Court affirm the judgment of the Eleventh Circuit.

Dated: August 30, 1984

Respectfully submitted,

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AFFIDAVIT OF MAILING

I, RONALD J. TABAK, counsel of record for Raymond Lee Franklin, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of August, 1984, within the time permitted for filing, I caused to be deposited in the United States mail, with first-class postage prepaid, forty copies of the foregoing Brief Of Respondent, properly addressed to the Clerk of the Supreme Court of the United States.

Ronald J. Tabak
Ronald J. Tabak

Subscribed and sworn to
before me this 30th day
of August, 1984, at
New York, New York.

James H. Bluck
Notary Public

JAMES H. BLUCK
Notary Public, State of New York
No. 24-4786542
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1985

CERTIFICATE OF SERVICE

I, RONALD J. TABAK, counsel of record for Raymond Lee Franklin, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of August, 1984, in accordance with the rules of the Supreme Court of the United States, I served upon the Petitioner the foregoing Brief Of Respondent, by causing three copies of the same to be deposited in the United States mail with proper address and with adequate postage prepaid to: Susan V. Boleyn, Esq., Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

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